Supreme Court, U.S.
FILED
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No. _____

IN THE

Supreme Court of the United States

JOHN S. RENDALL, *Pro Se, Petitioner*

v.

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION (SEC), *Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

This case involves a Fed. R. Civ. P. Rule 60(b)(1)(2) (4) and (6) and 28 U.S.C. § 144 motion for retrial due to material errors of the District Court Judge in his Amended Findings of Fact and Conclusions of Law, wherein Defendant Rendall was fined $5,000.00 under the Securities laws of the United States.

FIRST
Did District Court Judge D. Black show prejudice against Rendall (defendant) in using 'non-existent evidence' to bolster otherwise unsupported material findings to fine Rendall $5,000 with injunctive relief? Objectively, does Rendall's affidavit under Rule 28 U.S.C. § 144 claiming prejudice disqualify Judge Black from ruling on Rendall's Rule 60(b)(1)(2)(4) and (6) motion for a retrial based on material mistakes by the Judge?

SECOND.
Does the Judge, in using (fabricating) evidence not in the record, place himself 'above the law' in abusing his discretion to fine Rendall $5,000 (with injunctive relief) for "false and misleading statements" with the material evidence quoted not in the record, and so placing Rendall as beneath the operation of the law? Is this a basis for retrial under Rule 60 (b)(1)(2) (4) and (6)?

II. PARTIES TO THE PROCEEDINGS

"Petitioner"

John S. Rendall, *Pro Se*

"Respondent"

The Securities and Exchange Commission

Herbert M. Campbell II
Solv-Ex Corporation

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CITED AUTHORITIES

In Re Murchison,
349 U.S. 133, 136 75 S.Ct. 623, 625,
99 L.Ed. 942 (1955) 5

Re International Business Machines Corp.,
618 F.2d 923, 929 (1980) Second Circuit 6

United States v. Grinnell Corp.,
384 U.S. 563, 583, 86 S.Ct. 1698,
16 L.Ed.2d 778 (1966) 4,6

IV. CITATIONS ENTERED IN THE CASE BY COURTS

A. Case 98 CV 00860
Securities and Exchange v. Solv-Ex Corporation, et al.
Findings of Fact and Conclusions of Law in favor of Plaintiff, 40 pages dated **March 31, 2000**.

B. Judgment - Defendants are permanently restrained and enjoined from violations of sections set out and that Rendall and Campbell pay civil penalties of $5,000 each to SEC dated **May 6, 2000.**

C. United States Court of Appeals for the Tenth Circuit, Case No. 00-2339, Order of Remand to District Court to clarify and identify evidence that filings with the SEC were false and misleading dated **August 4, 2003.**

D. In the United States District Court for the District of New Mexico - Amended Findings of Fact and Conclusions of Law dated **September 24, 2003**.

E. United States Court of Appeals for the Tenth Circuit, Case No. 00-2339, Order and Judgment affirming judgment of the District Court and denying Rendall's motion for the entire record of exhibits dated **April 15, 2004.**

F. United States Court of Appeals for the Tenth Circuit - Order denying petition for re-hearing and hearing en banc dated **June 16, 2004**.

G. Pursuant to 28 U.S.C. § 1291 (1988 and Supp. 1992), the District Court denied Defendant Rendall's motion for disqualification and for relief from judgment filed pursuant to 28 U.S.C. § 144 and the Fed. R. Civ. P. Rule 60 (b)(1)(2) (4) and (6) Order dated **November 2, 2004**.

H. The Court of Appeals for the Tenth Circuit, by order and judgment, affirmed the judgment of the District Court dated **January 26, 2006**.

V. STATEMENT OF JURISDICTION

A.

On January 26, 2006, the Order and Judgment of the United States Court of Appeals for the Tenth Circuit was filed in Case No. 05-2001 (D.C. No. CIV 98-860 BB/RLP) (D.N.M.) and is the subject of this petition for review.

B.

The statutory provisions of the Rules of the Supreme Court of the United States, § 1253 and § 1254 (1).

VI. STATUTORY PROVISIONS

A.

AMENDMENT XIV
(adopted 1868)

SECTION 1. All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

B.

Fed. R. Civ. P. Rule 52

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially

and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

I. STATEMENT OF THE CASE

A. Background

The Securities and Exchange Commission (SEC) brought this enforcement action against Defendants Solv-Ex Corporation, its CEO John Rendall, and its senior vice-president and general counsel, Herbert M. Campbell II, for alleged violations of § 7(a) of the Securities Act of 1933 (Securities Act), § 10(b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act), and the rules promulgated under those Acts. The SEC contended that from January 1995 through April 1997, Defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC that created the misleading impression that each of the three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall and

Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each of them and permanently enjoined both men from future violations of § 17(a), § 10(b) and § 13(a) in an order dated May 16, 2000. Now proceeding *pro se*, Rendall and Campbell each appeal. Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district to supplement its factual findings.

Rendall appealed the District Court's findings to the Tenth Circuit Court of Appeals (COA) as there was no evidence to support such findings. The findings of the lower court were sent back by the COA to the District Court for further factual findings and explications of its reasoning on August 4, 2003.[1]

The Amended Findings of Fact and Conclusions of Law of the District Court (D.N.M.) dated September 24, 2003,[2] inexplicably removed citations to the record in support of five findings key to statements of Rendall on the progress of his bitumen extraction technology. These citations did not support the said findings. Instead, in support of those findings, the lower court cited 'non-existent video testimony' of the witness. Dr. J. Fox.

Following rulings of the COA in favor of the Judge's amended findings on April 15, 2004, Defendant Rendall filed a Fed. R. Civ. P. Rule 60 (b)(1)(2)(4)(6) and 28 U.S.C. § 144 motion in the District Court (D.N.M.)[3] to recuse Judge Bruce D. Black and for a retrial based on the use of evidence not in the record

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[1] Exhibit A 1, p. 21

[2] Exhibit A 2, p. 47, F. 31; p. 48, F. 34; p. 52, F. 44; p. 54, F. 48; p.54, F. 50

[3] Exhibit B 1, p. 103

and due to newly discovered material errors in key amended findings.

After oral argument on October 29, 2004,[4] Judge Bruce D. Black denied Rendall's motion on November 2, 2004, which was appealed to the COA on February 21, 2005.[5] On January 26, 2006, the COA upheld the Judge's discretion not to recuse himself and his discretion to deny Rendall's Rule 60 (b)(1)(2)(4)(6) motion for retrial,[6] resulting in this writ of petition for certiorari.

B. Concise Statement Relevant to Questions

1. The Court of Appeals (10th Circuit) (COA), in upholding the Judge's discretion in their Order and Judgment dated January 26, 2006, referred to the five errors in the amended findings as not sufficient to cause the Judge to recuse himself, as they did not show personal bias of the Judge.[7]

This opinion flies in the face of the Supreme Court ruling in United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698 16 L.Ed 2d 778 (1976), which held that:

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (citation omitted).

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[4] Exhibit B 2, p. 128, 154
[5] Exhibit B 3, p. 155
[6] Exhibit A 6, p. 98, 101
[7] Exhibit A 6, p. 100

There can be no clearer case than the Judge deliberately substituting citations of a witness (which did not support his key finding) with a non-existent video testimony of the same witness (Dr. J. Fox), to meet the objective test of Grinnell.

2. The Judge, the Honorable Bruce D. Black, placed himself above the law when he denied Rendall's detailed plea in oral argument relating to his 'fabrication of evidence,' to place a burden on Rendall of "making false and misleading statements" with no evidence and so placing Rendall below the operation of the law.[8] The Fifth Amendment of the U.S. Constitution guarantees Rendall a right to a fair trial. It is a stringent rule and will bar trial when the appearance of justice is not satisfied as well as (in) instances of actual bias. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

C. JURISDICTIONAL STATEMENT

1. The SEC brought this action pursuant to authority conferred on it by Section 20(b) of the Securities Act [15 U.S.C. § 78u(e)] to restrain and enjoin the defendants from engaging in the acts, practices and courses of business described in this complaint and acts, practices and courses of business of similar purport and object. The SEC also sought relief in the form of an order requiring Defendants Rendall and Campbell to pay a civil penalty.

2. The Court has jurisdiction in this action pursuant to Section 22(A) of the Securities Act [15 U.S.C. § 77v(a)], and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Certain of the acts, practices and courses of business constituting the violations of law alleged occurred, and all of the defendants reside, within the District of New Mexico.

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[8] Exhibit B 2, p. 139

3. Defendant Rendall filed a Fed. R. Civ. P. Rule 60 (b)(1)(2)(4)(6), and a 28 U.S.C. § 144 motion in the District Court (D.N.M.) in CIV 98-860 BB/RLP on April 15, 2004.

4. After oral argument on October 29, 2004, the Court denied Rendall's motion by order on November 2, 2004.

5. The Tenth Circuit Court of Appeals by Order and Judgment dated January 26, 2006 affirmed the judgment of the District Court (Case No. 05-2001).

VIII. ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

A. The Rule of Law in the United States is based on evidence in the record. The primary finder of fact based on evidence in the District Court is the judge (or jury) (the trier of fact). The U.S. Supreme Court laid out explicitly what would be considered bias and prejudice by a judge as the "finder of fact."

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1966). This issue was dealt with in Re International Business Machines Corp., 618 F.2d 923, 929 (1980) Second Circuit.

> As Mr. Justice Frankfurter noted in *Wilkerson v. McCarthy*, 336 U.S. 53, 65, 69 S.Ct. 413, 419, 93

L.Ed 407 (1949) (Frankfurter, J., concurring), "A timid judge, like a biased judge, is intrinsically a lawless judge."

The facts of this appeal are clear and ambiguous. The District Court resorted to non-existent video testimony as a citation for the basis of amended findings, material to Rendall's statements on the status of his bitumen extraction technology, when the original citations from the record did not support such findings. In oral argument on October 19, 2004:[9]

Mr. Rendall starts at page 10:

"...There is no basis on which the court of appeals could rightly look at the evidence except accepting Your Honor's version.

And now I'm presenting the evidence, Your Honor, which the court of appeals did not have, that this was not only a mistake, it was nonexistent evidence. No Court of law, Your Honor, can nonexistent evidence be used to justify findings of fact. It's outside the record.

And if you look at my affidavit, Your Honor, which is attached to the motion, the primary evidence is these paragraphs of the nonexistent video testimony of Dr. Jerry Fox, 31, 34, 44, 48 and 50. Paragraph 23 was the nonexistent quote from Dr. Alex Logwinuk, and I've attached --

THE COURT: What do you mean by a nonexistent quote? I just made that up, or it wasn't

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[9] Exhibit B 2, p. 138

sent to Denver with the record? What's your point exactly?

MR. RENDALL: In don't know where Your Honor got it from, but it wasn't in the transcript. Now, what was in the transcript – the position of reading of the findings – the original findings of fact, Your Honor, and the amended findings of fact is a concentration of issues which have no evidence in the record to back them up. The filtration of bitumen, he said, if you look at the transcript, could occur if the bitumen was heated. Instead, something was used to show it cannot be done. That's not in the evidence.

Paragraph 44, which is (in the) Appendix – which is Exhibit 111, Exhibit F, is attached as Exhibit E, which goes to the crux of this issue. This plant was running on March the 29th, and the conclusion of this Court in the findings of fact was that this was more or less a dream. It wasn't a dream. It was a real plant. It was 60 foot high, Your Honor. And that's all in the transcript testimony. It produced oil. Not filtered bitumen. Filtered bitumen is not in the exhibit.

And what was said herein paragraph 44 is a component – "due to buildup of fine particle solids, the filters were blinded." There is no such thing. No such thing in the document, no such thing in the transcript. The only place where it can be justified is the video testimony of Dr. Jerry Fox, and it's nonexistent.

So based on the evidence not in the record, based on a crucial issue, which is the primary issue in this

> case, extraction of bitumen, Your Honor, I would submit that I have a factual basis. Not a frivolous basis, Your Honor. I'm not here frivolous. I'm here after a lot of consideration, and in good conscience, that Your Honor was biased and prejudiced.
>
> To change – if we changed places, Your Honor, you would have told me I was fabricating evidence. If I changed it and did it, you would have called it fabrication.
>
> It is a serious issue, Your Honor, to reach findings of fact which destroy – well, this is not necessarily anything but rhetoric – destroy a company and its CEO based on evidence not in the record. And I have a reason in my affidavit to believe that Your Honor is biased and prejudiced. And I could not have filed this before now. It was in the court of appeals. And I believe the court of appeals did not have this evidence; it's newly discovered; it's a mistake. And I have filed an affidavit of your disqualifications, Your Honor, from any further opinion in this case.
>
> THE COURT: That will be denied."

The rulings of the District Court and the Tenth Circuit Court of Appeals on the citation of nonexistent video testimony to replace trial testimony (which did not support findings of the District Court) **has so far departed from the usual course of judicial proceedings, which calls for an exercise of this court's supervisory power – Supreme Court Rule 10(a).**

B. The basis the District Court used to justify material findings (amended), which were based on evidence not in the

record, is "that the Court of Appeals affirmed those findings."[10] In oral argument on October 29, 2004 it was stated by the Court as follows:

> "MR. RENDALL: This issue, Rule 52, clearly erroneous findings which can be set aside. But the only course of action to set aside a judgment based on clearly erroneous under Rule 59, the time passes. So Rule 60 has been introduced. And that's what I've used, Your Honor.
>
> THE COURT: I'm not sure at this point I have authority to set them aside. They've been affirmed by the court of appeals, which I think would make them the law of the case.
>
> MR. RENDALL: I didn't follow, Your Honor.
>
> THE COURT: I say, I believe the court of appeals has affirmed those facts, and that would make them the law of the case. I don't have the authority to overrule the court of appeals in Denver."

On the other hand, the Court of Appeals reviewed Rendall's appeal of the lower courts amended findings as clearly erroneous,[11] and ordered affirmation of the lower court's discretion not to disturb those findings even though they were erroneous.

These circular rulings place the Judge above the law in using "evidence not in the record: to justify clearly erroneous findings and places Defendant Rendall beneath

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[10] Exhibit B 2, p. 129

[11] Exhibit A 6, p.100, 101

(outside) the law and any pretense of judicial proceeding. Each court, the District and the Court of Appeals, rely on the rulings of each other to keep Rendall under the weight of clearly erroneous findings.

The Fifth Amendment of the U.S. Constitution guarantees Rendall a right to a fair trial. It is a "stringent rule" and will bar trial when the appearance of justice is not satisfied, as well as (in) instances of actual bias. In Re Murchison, *id.* **In this case, the appearance of justice is not satisfied.** Instead of examining Rendall's cause of action, the lower courts have quoted each other to avoid "due process" to look at the details of the errors (wherein the District Court did not even know where the errors came from).[12] It begs the question as to who wrote the findings and did the writer have a secondary motive other than the cause of fairness and justice.

In conclusion, Defendant Rendall respectfully requests this final court to allow Rendall's Writ of Certiorari according to generally accepted principles of equity and fairness, and to allow a review of judicial proceedings which were outside the pale of law on rulings based on nonexistent citations used to defend findings otherwise unsupportable.

IX. EXHIBITS

A. Orders, findings of fact and conclusions of law in conjunction with the judgment sought to be reversed.

1. Order of the Court of Appeals (Tenth Circuit) dated August 4, 2003 remanding to District Court for evidence of "false and misleading" 15

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[12] Exhibit B 2, p. 138

2. Amended Findings of Fact and Conclusions of Law of the District Court (D.N.M.) dated September 24, 2004. 37

3. Order of the Court of Appeals (Tenth Circuit) dated April 15, 2004, affirming judgment of the District Court. 85

4. Judgment of District Court dated May 16, 2000. 90

5. Order of the District Court denying Rendall's Motion for retrial under Fed. R. Civ. P. 60 (b) and motion to disqualify under 28 U.S.C. § 144 dated November 2, 2004 96

6. Order and Judgment of the United States Court of Appeals for the Tenth Circuit affirming the District Court's denial of Rendall's motions dated January 26, 2006 98

B. Material required to show when and how the Federal questions sought to be reviewed were raised in the Court of Appeals.

1. Appellant (Rendall's) Fed. R. Civ. P. Rule 60 (b)(1)(2)(4)(6) motion and 28 U.S.C. § 144 motion for disqualification of the District Court Judge (without the Exhibit) 103

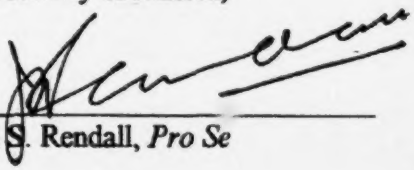
2. Oral argument dated October 29, 2004 before Judge Bruce D. Black. 128

3. Appellant's Brief on Appeal to the
United States Court of Appeals for the
Tenth Circuit dated February 21, 2005 155

For the aforementioned reasons, John S. Rendall respectfully requests that this Court grant a Writ of Certiorari for this Petition.

Dated: April 11, 2006

Respectfully submitted,



John S. Rendall, *Pro Se*

EXHIBIT'S A 1-6

EXHIBIT'S A 1-6

EXHIBIT A 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

No. 00-2339
(D.C. No. CIV-98-860-BB)
(D.N.M.)

ORDER
Filed August 4, 2003

Before **HENRY, PORFILIO AND MURPHY,**
Circuit Judges

The Securities and Exchange Commission (SEC)

brought this enforcement action against defendants Solv-Ex Corporation, its CEO John Rendall, and its senior vice president and general counsel Herb Campbell, for alleged violations of § 17(a) of the Securities Act of 1933 (Securities Act), § 10(b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act) , and the rules promulgated under those Acts. The SEC contended that, from January 1995 through April 1997, defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC, that created the misleading impression that each of three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV. Doc. 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall and Campbell made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each of them and permanently enjoined both men from future violations of § 17(a), § 10(b), and § 13(a). Now proceeding *pro se*, Rendall and Campbell each appeal. Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district court to supplement its factual findings.

Factual Background

Rendall, an experienced chemical engineer, founded

Solv-Ex in 1980 for the primary purpose of developing and implementing a new technology to process and recover bitumen from oil sands.* Rendall was involved in all significant aspects of Solv-Ex's business. Campbell joined Solv-Ex in May 1992 after having worked in management positions for various mining companies. Campbell testified that to the extent there was a management team, he, Rendall, and John Butler were the people who ran things on a day-to-day basis at Solv-Ex. Among other things, Campbell "assumed primary responsibility for drafting press releases and reviewing public statements about [Solv Ex's] projects, and handling shareholder relations." Suppl. R. Vol. XIII, Doc. 120 at 4.

In the 1980's, Solv-Ex built a pilot plant and laboratory in Albuquerque, New Mexico, to further test and develop its new bitumen extraction process. A key component of this new process, which used hot water and steam rather than chemicals to separate the oil from the sand, was a piece of equipment known as the log washer. In 1988, Solv-ex acquired 100% of the working interest in a lease in the Athabasca oil sands of Alberta, Canada, known as Lease 5. After preparing a feasibility study and acquiring financing, Solv-Ex began construction of a plant on Lease 5 that would use the new bitumen extraction process. This new process for bitumen extraction was one of the three technologies about which the SEC contended defendants made materially false and misleading statements or material omissions

Although Solv-Ex's core technology was bitumen extraction, it also developed technologies to extract minerals from the clay sands as a by-produce of bitumen production. The primary mineral of interest to Solv-Ex was aluminum

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* Bitumen is a heavy oil with the consistency of tar.

oxide, or alumina, which is used in electrolytic cells for the production of metallic aluminum. Solv-Ex believed it could produce a unique kind of alumina that could remain in solution within the cell at much lower temperatures than alumina currently available on the market. Solv-Ex also worked on designing and constructing a new kind of electrolytic cell that would use this new alumina. This new electrolytic cell was the second technology about which the SEC alleged defendants made materially false or misleading statements or material omissions.

In producing alumina from the clay fines, Solv-Ex discovered a synthetic mineral that exhibited some qualities of brightness similar to that of titanium dioxide (Ti02), a naturally occurring mineral used as a high-end pigment in many industrial applications. Solv-Ex named its synthetic mineral "Ti02S," which stood for "Titanium dioxide substitute," and explored uses for this synthetic pigment in the paint, plastics, and paper industries. The development of Ti02S was the third technology about which the SEC alleged defendants made materially false or misleading statements or material omissions.

Elements of the Alleged Securities Fraud

Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and § 17(a) of the Securities Act (15 U.S.C. § 77q(a)) are general fraud provisions. Together with Rule 10b-5 (17 C.F.R. § 240.10b-5), they make it unlawful for a person or entity, in connection with the purchase or sale of a security, to employ any device, scheme, or artifice to defraud, to make an untrue statement of material fact, or to omit material fact that is necessary to make the statements made, in the light of the circumstances under which it was made, not misleading. Section 13(a) of the Exchange Act (15 U.S.C. § 78m(a))

requires the issuer of a security to file annual and quarterly reports with the SEC, and Rule 12b-20 (17 C.F.R. § 240.12b-20) provides that required filings with the SEC must include "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made[,] not misleading."

Both the Securities Act and the Exchange Act expressly authorize the SEC to bring a civil enforcement action seeking injunctive relief whenever it appears that a person is engaged, or is about to be engaged, in activities that violate the respective Acts or the rules promulgated thereunder. 15 U.S.C. § 77t(b) (Securities Act); *id.* § 78u(d)(1) (Exchange Act). Both Acts also authorize the SEC to seek monetary penalties for violations of the respective Acts or the rules promulgated thereunder. *Id.* § 77t(d)(1) (Securities Act); *id.* § 78u(d)(3)(A) (Exchange Act).

Because the SEC is statutorily authorized to bring an enforcement action, it does not have to prove those elements that a private person must prove to establish his standing to bring an action. In particular, the SEC does not have to prove that any investor either relied upon or was injured by the material misstatement or omission. *See SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363 n.4, 1364 (9th Cir. 1993) (action under § 10(b) and Rule 10b-5); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (same); *Kramas v. Sec. Gas & Oil Inc.*, 672 F.2d 766, 770 (9th Cir. 1982) (private action under § 17(a)).

The SEC does, however, have to prove those elements that establish the wrongful conduct and, thus, the securities law violation. To establish a violation of § 10(b) and Rule 10b-5, the SEC must prove that each defendant: "(1) made a material misrepresentation or a material omission as to which

he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999). "Essentially the same elements are required under Section 17(a)(1)-(3) in connection with the offer or sale of a security, though no showing of scienter is required for the SEC to obtain an injunction under subsections (a)(2) or (a)(3)."[†] *Id. (citing, inter alia, Aaron v. SEC*, 446 U.S. 680, 701-02 (1980)). The SEC need not prove scienter in a civil enforcement action under § 13(a) for filing false or misleading reports with the SEC. *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998). It need only establish that the defendant filed a required report with the SEC that contained information that was materially false or misleading or omitted material facts.

[†] Section 17(a) provides as follows:(a) Use of interstate commerce for purpose of fraud or deceit It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in Section 206B of the Gramm-Leach-Bliley Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly.(1) to employ any device, scheme or artifice to defraud, or(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material face necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Requirements of Fed. R. Civ. P. Rule 52(a)

In actions tried on the facts without a jury, Fed. R. Civ. P. 52(a) requires the trial court to "find the facts specially and state separately its conclusions of law thereon." "[T]he touchstone for whether findings of fact satisfy Rule 52(a) is whether they are sufficient to indicate the factual basis for the court's general conclusion as to ultimate facts so as to facilitate a meaningful review of the issues presented." *Joseph A. ex rel. Wolfe v. N.M. Dep't of Human Servs.*, 69 F.3d 1081, 1087 (10th Cir. 1995) (quotations omitted). "Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those facts are clearly erroneous." *Roberts v. Metro. Life Ins. Co.*, 808 F.2d 1387, 1390-91 (10th Cir. 1987) (quotation omitted). Here, although the district court made lengthy findings of fact, there are some important gaps the preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the district court for further factual findings and explications of its reasoning, as we explain below.

Materially False or Misleading Statements and/or Omissions in Public Statements other than SEC Filings

1. Which Public Iterations Were Actionable?

The district court found that Rendall and Campbell made numerous false or misleading statements and that at least three of them were material. These three material misrepresentations relate to each of the three technologies, respectively. They are as follows: 1) "that commercial-scale production of bitumen oil had begun on March 29 at the Solv-

Ex plant in Alberta, Canada;" 2) "that the testing of a purportedly revolutionary 2700 ampere electrolytic cell used for the production of metallic aluminum had been 'successful' and was therefore going to be scaled up;" and 3) "that an industrial mineral created from the by-produce of Solv-Ex's bitumen extraction technology, Ti02S, had been shown to be suitable for certain applications in the paint and plastics industries. Statements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic." R. Suppl. Vol. XIII, Doc. 120 at 36.

In setting out these three material misrepresentations, the district court did not specify when and by whom each of these misrepresentations was made.‡ We will assume, however, that the court intended to include at least those iterations of the misrepresentations to which it referred in its subsidiary findings. Those findings refer to three public iterations of the first material misrepresentation, relating to bitumen production: A March 31, 1997 press release; and April 7, 1997 conference call; and an April 30, 1997 press release.

The subsidiary findings refer to six public iterations of the second material misrepresentation, relating to the electrolytic cell: a February 26, 1996 press release; a March 11, 1996 press release; an August 26, 1996 letter to shareholders; a September 5, 1996 conference call; a

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‡ The identity of the speaker is obviously relevant for liability purposes. The timing of the statement may also be relevant because liability depends on what the speaker knew at the time he made the statement. Thus, a statement that may not have been actionable when first made, in light of what the speaker knew at the time, may become actionable on subsequent repetition if new facts have since come to light that reveal the false or misleading nature of the statement to the speaker.

September 10, 1996 press release; and a December 3, 1996 conference call. The subsidiary findings do not mention the first and most complete iteration of this representation: the January 23, 1996 press release that was issued shortly after the test of the 2700 ampere cell. It is unclear whether the district court merely overlooked this press release in its findings, or whether it purposely omitted mention of the press release due, perhaps, to its timing or some other fact. On remand, the district court should clarify whether it intended to include the January 23, 1996 press release among the public statements it found to be materially false or misleading.

When we come to the third material misrepresentation the district court found defendants made, we run into further difficulties. This third misrepresentation is composed of two parts the first of which poses no problem. The district court found that defendants misrepresented that "an industrial mineral created from the by-product of Solv-Ex's bitumen extraction technology, Ti02S, had been shown to be suitable for certain applications in the paint and plastics industries." *Id.* The subsidiary findings refer to two public statements that contain representations as to Ti02S's suitability for applications in the paint and plastics industries: a September 5, 1996 conference call; and a September 6, 1996 press release.

The second part of the misrepresentation is not so straightforward The district court found that "[s]tatements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic." *Id.* This finding is extremely vague, especially in light of the record evidence and the district court's subsidiary findings. The record reveals many different statements by one defendant or the other about Ti02S's potential as it relates to the paper industry. Likewise, the district court made numerous

subsidiary findings about Ti02S as it relates to the paper industry. Some of these findings concern statements about the production of TI-2S, some concern statements about past test results, and some concern statements about future testing. Only one subsidiary finding concerns a statement about Ti02S's potential *use* in the paper industry. That statement was made in a September 6, 1996 press release, which said that "independent testing to date" showed Ti02S appears quite suitable for the huge filler markets in paper." *Id.* at 21. The district court's use of the plural "statements" in its finding that "[s]tatements regarding the potential for Ti02S in the paper industry were largely unproven and therefore overly optimistic," however, suggests that it had more in mind than this single statement. Perhaps the court was referring to statements about potential production and/or testing of TI02S, as well. From our review of the court's decision, however, we cannot accurately ascertain which other statements about Ti02S the district court found to be actionable. On remand, the district court should identify which statements by Campbell and/or Rendall about Ti02S's potential as it relates to the paper industry, the court found to be materially false or misleading.

2. What was false about the statement and/or what material facts were omitted that should have been included to make the statements not misleading?

The district court's ultimate findings of material misrepresentation also do not identify exactly what was false or misleading about defendants' statements, including what material facts should have been disclosed to make the statements not misleading. While the district court's subsidiary findings include numerous facts that our review shows were not revealed in defendants' public statements, the court made no findings as to which of those omitted facts were

material.

For instance, with regard to defendants' representations that commercial-scale production of bitumen had begun at the Alberta plant on March 29, the district court made the following subsidiary findings: 1) during the March 29 run of the log washer circuit, installation of the automatic instrumentation had not been completed; 2) Solv-Ex personnel determined that modifications in the water circulation and clarification circuit would be necessary to achieve continuous operation; 3) the log washer had to be shut down after only twelve hours due to an unexpected build-up of solids in the pump box; 4) Solv-Ex was not able to filter bitumen successfully at the Lease 5 plant until April 21, 1997, at which time it produced only two 55-gallon drums; 5) Solv-Ex was not able to duplicate the production of filtered bitumen thereafter; 6) only after two or three cycles of operation, the log washer circuit again developed operational problems on April 21 and had to be shut down; 7) in fact, after the log washer was shut down initially on March 29, it was not operated thereafter except for isolated test and demonstration runs of no more than six hours; and 8) Solv-Ex was never able to sustain continuous operation of the log washer at the Alberta plant.

If we compare these subsidiary findings to the defendants' relevant public statements of March 31, April 7, and April 30, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the district court found to be material. Materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). Findings as to materiality are for the district court to make in the first

instance.

We face the same problem with regard to the other two representations the district court found to be materially misleading. Even if we could determine what facts recited by the district court are missing from the relevant public statements about the cell and about Ti02S.[§] we cannot determine which of those facts the court found to be material. On remand, the district court should make additional findings as to what was false or misleading about the relevant statements by defendants, including what material facts were omitted, if any.

Scienter

Additional findings by the district court as to what material facts defendants failed to disclose are also essential to our review of the issue of scienter with respect to the claims under § 10(b) and § 17(a)(1). Scienter is a "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976) The scienter element may be satisfied by conduct that is reckless, which we have defined in the securities fraud context as "conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996) (quotation omitted).

"Courts have been cautious about imposing liability for securities fraud based on reckless conduct, however." *City*

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§ And as previously discussed, we cannot even be sure which public statements about those two technologies the district court found to be actionable.

of Phila. v. Fleming Cos., Inc., 264 F.3d 1245, 1260 (10th Cir. 2001). A finding of scienter cannot be based on "fraud by hindsight, for example, because corporate officials should be liable for failing to reveal only those material facts reasonably available to them." *Id.* (quotations omitted). Also, that a defendant knew facts that the court later determines "to have been material, without more, is not sufficient to demonstrate that the defendant intentionally withheld those facts from, or recklessly disregarded the importance of those facts to, a company's shareholders in order to deceive, manipulate, or defraud." *Id.*

We have held that , "to establish scienter in a securities fraud case alleging non-disclosure of potentially material facts, the plaintiff must demonstrate: (1) the defendant knew of the potentially material fact, and (2) the defendant knew that failure to reveal the potentially material fact would likely mislead investors." *Id.* at 1261. Recklessness may satisfy the knowledge requirement under this scenario if the defendant has "knowledge of a fact that was so obviously material that the defendant must have been aware both of its materiality and that its non-disclosure would likely mislead investors." *Id.*

The district court's findings touch very little on either Rendall's or Campbell's state of mind. The court did find that "Solv-Ex, Rendall and Campbell knew, or were reckless in not knowing, several of the material statements they issued were false and misleading[,]" but the court did not specify the statements to which it referred. R. Suppl. Vol. XIII, Doc. 120 at 38. The court's subsidiary findings do not otherwise provide us a clear understanding of the factual basis for the court's ruling as to scienter. Although the court did make specific findings as to one or the other defendant's knowledge of a few facts, it did not make similar findings as to many

other facts. We cannot effectively review the question of scienter without knowing which material facts the district court determined each defendant knew. For example, Campbell testified that he did not have actual knowledge of a host of facts on which the SEC relied in arguing that his statements were materially false or misleading. The district court 's decision does not reveal whether the court disbelieved this testimony, or whether the court believed it, but nonetheless imputed knowledge of certain facts to Campbell.

Further, Campbell contended that he consulted with Rendall and other scientists before drafting any public statement and that he had no duty to look behind their representations and read the technical reports himself. The district court's decision suggests that it concluded that Campbell did have a duty to read the technical reports. *See id.* at 37 (stating that Campbell "had access to all of the negative tests and consultants' caveats which he chose to largely ignore in drafting the press releases"). If the court did impose such a duty on Campbell, the scope of that duty is not apparent from the court's decision.

For instance, the court may have concluded that Campbell had an absolute duty to ascertain the facts firsthand by reading the technical reports before he drafted any public statement about the technologies. Or, the court may have concluded that while Campbell ordinarily could have relied on the technical information he received from conversations with Rendall and others, he knew certain facts that made that reliance unreasonable and triggered a duty to independently verify the information by reading the reports himself. We express no opinion as to whether either of these theories would be factually or legally supportable. We mention them only to illustrate that we have no clear understanding of the basis for the court's ruling as to scienter.

On remand, the district court should make additional findings addressing what each defendant knew. If the court did impute knowledge of any facts to either defendant, it should explain the legal and factual basis for that imputation.

Materially False or Misleading Statements or Omissions in SEC Filings

The district found that "Solv-Ex filed materially false reports with the Commission, and filed reports with the Commission that, in addition to the information expressly required to be included in the report, failed to include such further material information as was necessary to make the required statements, in the light of the circumstances under which they were made, not misleading." *Id.* at 39. The district court did not, however, identify the filings to which it was referring. Looking elsewhere in the district court's decision, we find a reference to the Form 10-K for FY1995 and a reference to the Form 10-K and amended Form 10-K for FY1996. The Court recited certain disclosures in the FY1995 Form 10-K, but did not state that those disclosures were false or misleading in any way. *Id.* at 29. The court found that the FY1996 Form 10-K and amended Form 10-K "contained misleading statements regarding the status of Solv-Ex's aluminum reduction cell testing and technology." but it did not specify which of the statements about the cell and its technology in either of those filings were misleading. *Id.* at 32.

To effectively review the propriety of the court's finding that Solv-Ex filed periodic reports with the SEC that were materially false and omitted material facts necessary to make them not misleading, we must be able to ascertain which filings and which statements within those filings the district court found to be materially false or misleading. And we must

be able to ascertain what facts that were omitted from those statements the district court found to be material. At present, we cannot ascertain any of that information absent additional findings by the district court.

Issues Not Affected by the Need for More Findings

Although most of the issues raised by Rendall and Campbell on appeal require more findings from the district court for their resolution, a few do not. In particular, we do not need additional findings in order to decide whether the SEC was required to prove either that investors relied on defendants' statements or that those statements caused the fluctuations in stock price that led to investor injury. As our earlier recitation of the elements of the SEC's claims reveals, the SEC did not have to prove either that any investor relied on defendants' statements or that any investor was injured by those statements. That the SEC may have argued either reliance or causation as part of its case does not alter its ultimate legal burden.

Nor do we need additional findings to determine whether the district court abused its discretion in excluding certain evidence defendants claim was relevant to the materiality of their statements, to investor reliance, and to causation. We review the district court's evidentiary rulings under an abuse of discretion standard, "considering the whole record and reversing only if there is a firm and definite belief the trial court made a clear error in judgment." *United States v. Marshall*, 307 F.3d 1267, 1269 (10th Cir. 2002).

One of the defendants' theories at trial was that during the relevant period, a group of short-sellers were trying to manipulate the price of Solv-Ex stock for their own gain by, among other things, launching a barrage of negative publicity

about Solv-Ex and its technologies. Defendants argued that the evidence would show the short-sellers were successful in driving the market, while defendants' own public statements had no effect. Defendants contended that because their public statements had no effect on the price of Solv-Ex stock, those statements could not have been either material to any investor or the cause of any investor loss.

To support their theory, defendants attempted to introduce testimony showing that the price of Solv-Ex stock did not always go up in reaction to positive public statements by defendants; in fact, the price sometimes went down despite defendants' positive public statements, due to the actions of short-sellers. The SEC objected to both Rendall's and Campbell's testimony on this matter. The district court sustained the SEC's objections, but did permit counsel to make an offer of proof.

Defendants made the following offer of proof:

> The tender would be that I'll have Mr. Campbell discuss what happened to the price in February and March, 1996; their various press releases - I was going to show him some that relate to the repeated disclosure of the aluminum cell test. One on February the 23, and a second one on March 21. And the price - with respect to the February 21, the price of that date declined substantially. March 21, it went up a minor amount, less than a point. And then along came this negative publicity he just mentioned from the Wall Street Journal, Barron's Dan Dorfman, just back to back, three days in a row, right after the most positive announcement the company ever made, and the stock declined 70 percent; from 21 to 7, which we think shows there are other influences in the

> market, and it's certainly not Solv-Ex's public statements that are driving the price of the stock upward. That's the tender.

Id. at 1283. Although counsel did not explicitly include any exhibits in his tender, it is apparent from a discussion at the conclusion of the trial both that counsel intended to tender to include exhibits and that the court understood them to be included. *See* R. Suppl. Vol. VI at 1570-71. We assume the exhibits intended to be tendered included Exhibits 865-1049.

On appeal, both defendants argue that the court erred in excluding the tendered evidence. They contend that the excluded evidence was part of the total mix of information available to investors, so the district court should have considered it in making its assessment of materiality. They further contend that had the court considered the excluded evidence, that evidence would have established that none of defendants' statements were material.

As we noted earlier, materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information," *Basic Inc.*, 485 U.S. at 240. "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [act]." *Id.* at 231 (quotation omitted). In other words, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Id.* at 231-32 (quotations omitted).

The negative publicity about Solv-Ex was part of the total mix of information available to investors and, to that extent, was relevant to the issue of materiality. The excluded

evidence was not the only evidence of negative publicity before the court, however, and the court indicated that it was well aware and that there was substantial negative publicity about Solv-Ex during the relevant period. To the extent the excluded evidence related to other activities of short-sellers or to fluctuations in the price of Solv-Ex stock, it had little if any relevance to the issue of materiality. Even if relevant, however, none of the excluded evidence established what defendants argue: that none of their own public statements were material.

First, even if the market did not reflect a direct correlation between the issuance of positive public statements by defendants and the price of Solv-Ex stock, that does not mean that defendants' statements were immaterial. Their positive public statements may well have buffered what otherwise would have been a greater drop in the stock price. Moreover, even if investors were aware of negative publicity about Solv-Ex from third-party sources, that does not mean that defendants' own statements were not material. "Ordinarily, omissions by corporate insiders are not rendered immaterial by the fact that the omitted facts are otherwise available to the public." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1114 (9th Cir. 1989).

There is a significant difference between information provided by third parties and information provided by corporate insiders, especially as regards the status of research and development of new technologies. *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091 (1991) ("Shareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources...."). Campbell himself acknowledged this difference when, in response to a question whether negative publicity about Solv-Ex's technology caused him to question that technology, he testified

that it did not because the reports were made by people who had not talked to Solv-Ex or seen the technology firsthand. "[H]ow could they know what they are talking about? They've never seen the technology. They didn't even know what it was. You say that should make me suspicious. I hardly think so." R. Suppl. Vol. IV at 1115.

The three groups of defendants' statements that the district court found to be materially false or misleading all related to matters that a reasonable investor would expect a corporate insider to have considerably more knowledge of than any third party. Thus, the inclusion of negative statements from third parties in the general mix of information about Solv-Ex did not negate the materiality of defendants' own statements. *Cf. In re Apple Computer Sec. Litig.*, 886 F.2d at 1114 (holding that under fraud on the market theory, the facts omitted by corporate insider must be "transmitted to the market with roughly equal intensity and credibility, [for] the market [to] receive complete and accurate information").

Because other evidence of negative publicity about Solv-Ex was introduced at trial, and because the excluded evidence did not negate the materiality of the statements the district court found to be false and misleading, we conclude that the district court did not abuse its discretion in excluding the tendered evidence on the issue of materiality. Nor did the court abuse its discretion in excluding the evidence to the extent it was relevant to either investor reliance or causation. As we held earlier, neither of those matters were properly at issue in this SEC enforcement action.[**]

[**] Rendall also makes a related argument on appeal that the magistrate judge erred in striking several of defendants' affirmative defenses that were based on the actions of third parties in the market. The record does not reflect that defendants ever sought reconsideration of that order before the district court.

Conclusion

The remaining issues that Rendall and Campbell raise on appeal are affected by our need for additional findings from the district court. Therefore, we will not address them at this time. Instead, we will remand to the district court for the limited purpose of making additional findings of fact, and conclusions of law where necessary, in accordance with our discussion above and with the following directive.

On remand, the district court should 1) clarify whether it intended to include the January 23, 1996 press release among the public statements it found to be materially false or misleading; 2) identify what statements Rendall and/or Campbell made about Ti02S's potential for use in the paper industry that were materially false or misleading; 3) identify what material facts were omitted from the three statements set forth in Conclusions of Law ¶ 11 of the Court's Findings of Fact and Conclusions of Law that should have been included so as not to make the statements misleading; 4) identify what material facts that were omitted or falsely stated that Rendall knew or what material facts that were omitted or falsely stated that Campbell knew; 5) clarify whether the court imputed knowledge of any material fact to either Rendall or Campbell and, if so, the factual and legal basis for that imputation; and 6) identify what filings with the SEC and which statements within those filings were materially false or misleading, and identify what material facts were omitted from those statements that should have been included to make the statements not misleading.

"[A]ppellate courts are without power to hear appeals directly from orders of federal magistrates." *Pippinger v. Rubin*, 129 F.3d 519, 533 (10th (Continued)Cir. 1997) the magistrate judge's order, "we may not consider the issues decided in that order on appeal." *Id.* at 534.

This court will retain jurisdiction of this appeal pending the district court's further rulings, which shall be certified to this court as a supplemental record.

IT IS SO ORDERED.

Entered for the Court
PATRICK FISHER, Clerk

By: s/Karen Phillips
Deputy Clerk

EXHIBIT A 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v. No. CIV 98-860 BB

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

COURT'S AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for a trial to the Court without a jury on December 20, 21, 22 and 23, 1999, and February 24, 25, 28, and 29, 2000, and all evidence having been presented, having considered the parties' proposed findings and conclusions, and having reviewed the relevant law, the Court now files its amended findings of fact and conclusions of law:

Findings of Fact

History and Background of the Defendants

1. Solv-Ex, a New Mexico corporation, was formed in 1980 to engage in research and development of improving, as well as developing, technology to process and recover bitumen (heavy, low specific gravity crude oil) from oil sands. Ex. 863, pp. 1, 42. Solv-Ex publicly raised several million dollars through an initial public offering and private offerings to engage in such research and development activities.

2. John Rendall was the principal founder of Solv-Ex. Since its inception, Mr. Rendall has been Solv-Ex's Chairman, CEO, and larges individual shareholder. As Solv-Ex's Chairman and CEO, Mr. Rendall has been involved in all significant matters involving the Company.

3. Prior to incorporating Solv-Ex, Mr. Rendall's professional career for the period 1959 through 1979 involved designing, commissioning, operating and managing more than ten chemical, petrochemical and industrial plants in England. Mr. Rendall joint-ventured a company he started with Rio Tinto Zinc ("RTZ") to market his extractive processes, including technology to make oil from oil sands. The Athabasca sand in the northern region of Alberta, Canada, contains bitumen. In connection with the RTZ joint venture, Mr. Rendall established a process that extracted oil from the Athabasca tar sands and assisted in the construction of a pilot plant to test that process located near Fort McMurray, Alberta,

Canada, in 1976. The process involved the use of solvents in extracting oil from tar sands. IN 1979, Mr. Rendall discovered that a commonly available piece of equipment, known as a logwasher, had the capacity to separate oil from the crushed rocks, sand, water and fine clay residue and he patented that process.

4. In the 1980's, Solv-Ex built a pilot plant and laboratory in Albuquerque, New Mexico to further develop, test and improve upon the process for extracting oil from bitumen. At the time, the process was a solvent assisted hot water process intended to provide high bitumen recovery rates for a wide range of ore grades, while producing waste tailings which were more environmentally acceptable.

5. In 1988, Solv-Ex acquired 100% of the working interest in the Bitumount lease in Alberta, Canada, known as "Lease 5" which covered 5,874 acres. On January 6, 1989, Drs. George S. Pemberton and Michael S. Ranger, Professors of Geology at the University of Alberta, issued a report entitled "Geology of the Solv-Ex Corporation Athabasca Oil Sands Lease Including Bitumen and Titanium Reserve," which estimated reserves at 1.127 billion barrels of bitumen.

6. In May 1992, Herbert Campbell joined Solv-Ex as senior vice president and general counsel. Prior to joining Solv-Ex, Mr. Campbell had worked in various management positions for mining companies, including the raising of venture capital. Since NASDAQ had threatened to suspend the listing for Solv-Ex, one of his first duties was to satisfy the

demands of that stock exchange. His other duties included preparation of a business plan to assist in raising working capital for Solv-Ex, negotiating and preparing an agreement with the Alberta Oil Sands Technical Research Authority to fund pilot plant testing of bitumen tailings, and engaging in efforts to raise capital to build a minerals processing plant. Later, Mr. Campbell's duties covered negotiating and preparing the acquisition of another oil sands lease in the Athabasca region, negotiating and preparing agreements with outside consultants who assisted Solv-Ex in the evaluation and development of its processes, and raising capital to build oil extraction and minerals production facilities. Mr. Campbell also assumed primary responsibility for drafting press releases and reviewing public statements about those projects. He also had those statements disseminated to the business community through the Business Wire. He also drafted portions of the Company's periodic reports between 1995-1997 and handled shareholder relations as well as performed the duties of Corporate Secretary and General Counsel.

7. There are three generally accepted steps in the evolution of taking an idea from the drawing board to producing a product or improving upon a process to achieve commercial production. First, the initial discovery, testing and development of the process or product is done under controlled laboratory conditions or "bench scale" testing. Second, the product or process should be tested and proven in an intermediate step, usually, a pilot plant or prototype model, that is larger and more elaborate than the laboratory, but not fully up to scale of a commercial application. Third, the process or product must be proven in a

commercial plant. The likelihood of a financially viable project cannot be reliably predicted until the process reaches this third stage. Solv-Ex operated its bitumen extraction technology only at the laboratory and pilot plant scale from February 1995 through December 1996. The electrolytic cell and Ti02 products never proved successful beyond the scale or bench level. From 1995 to 1997, however, Solv-Ex press releases, shareholder letters, and SEC filings created the impression each of these processes was moving forward with great success.

Bitumen Production

8. In a conference call held on May 18, 1995, Mr. Rendall indicated that a marketing contract for the oil is at hand and should be announced before "we get into financing." Ex. 769, pp. 6, 8.

9. In May 1995, Mr. Rendall also signed a glowingly optimistic letter to shareholders indicating Lease 5 was "estimated to contain one billion barrels of oil" and "the project to produce synthetic minerals, including alumina, from the Suncor tailings ponds, could be in production by the end of the year." Rendall also represented, "we have nearly completed our electrolytic test cell for production of aluminum metal and expect to have it operational in the near future." Ex. 766. Since the scale level cell had not even been tested, much less the prototype, it was highly optimistic to postulate it could be operational "in the near future."

10. In Jun 1995, Solv-Ex signed a letter of intent with Gibson Petroleum Company, Ltd. ("Gibson") to enter

into a marketing agreement whereby Gibson would market a visbroken bitumen product to be produced by Solv-Ex at a proposed plant to be built at Least 5. Ex. 107. Visbreaking is a thermal process utilized to break down heavy molecules into lighter molecules, in order to produce from bitumen in a lighter product such as gasoline, as well as a heavy residue product. Logwinuk video testimony.

11. According to Mr. Campbell, the Gibson letter of intent was particularly important because unless you had a market outlet for it, financing would not follow.

12. On July 24, 1995, Solv-Ex announced in a press release that it acquired the Fort Hills oil sands lease, located adjacent to Lease 5, covering approximately 50,000 acres and containing, according to preliminary estimates, approximately 3 billion barrels of recoverable oil. Ex. 775, ¶ 1.

13. By August 1, 1995, Solv-Ex reported to its shareholders that the permit applications and Environmental Impact Assessment for development of Lease 5 had been filed with the Canadian government. Ex. 776, p. 1.

14. In the September 26, 1995 press release, Mr. Rendall stated that the upgraded bitumen process together with the Gibson marketing agreement "assures product marketability and should yield production in excess of design capacity of 14,000 barrels a day of heavy oil, according to the final audit report." Ex. 781, ¶ 1. Plant "commissioning ... (is) targeted for late 1996." Id., at ¶ 5. Financial presentations have been well received according to Solv-Ex's financial consultant,

Charter Oak Capital. Id., at ¶ 6.

The proposed plant was to consist of four logwasher "circuits." Exs. 104, 106, 506.

15. In the December 12, 1995 press release, Solv-Ex announced that it received formal approval from the Alberta Energy and Utilities Board to proceed with construction on Lease 5 of the oil extraction plant (with subsequent construction of a minerals processing plant to follow). Ex. 787, ¶¶ 1, 2. The target date for commencing production of the oil extraction facility was to be late 1996 or early 1997. Id., at ¶ 5. The capacity could exceed 10,000 barrels of oil per day depending on the blend and the feed rate of the bitumen. Id., at ¶ 1. At the request of Solv-Ex, the permit characterized the plant or project as "experimental" in order to ensure that: (i) the royalty to be received by the Crown on production would be limited to one percent (1%) until Solv-Ex requested commercial status for the plant; (ii) Solv-Ex would not be prejudiced in applying for certain research and development tax credits for the new plant under Canadian tax law; and (iii) no public hearings would be needed to secure the additional necessary permits. Ex. 520.

16. On January 17, 1996, Solv-Ex announced in a press release that it had entered into a letter of intent with Ledcor Industries, Ltd. for construction of the planned 14,000-barrel-per-day oil extraction and upgrading plant on Lease 5 (at an estimated capital cost of $100 million). Ex. 792, ¶ 1.

17. Solv-Ex raised $73 million from various sources, including investors, in 1996.

18. Mr. Rendall stated in a conference call on February 9, 1996 that Solv-Ex's objective was to produce oil at $5 to $6 per barrel in early 1997. Ex. 795, pp. 4, 5. Mr. Rendall also stated that approximately $200 million was needed to complete all of Solv-Ex's projects. Id. at p. 9.

19. In a conference call on March 26, 1996, Mr. Rendall stated that the schedule envisioned meeting the objective of completing construction by year-end, with planned cash flow by mid-1997 and full production by year-end 1997. Ex. 802, pp. 3, 14, 15.

20. In the August 19, 1996 conference call, Mr. Rendall expressed Solv-Ex's intent, based upon available capital, to start production in the first quarter of 1997.

21. In the August 22, 1996 press release, Mr. Rendall stated, "We have sufficient funds on hand to ensure our facility will become operational on a commercial basis...(and) that the project is on schedule and under budget" during the first quarter of 1997. Ex. 812, ¶ 2. Mr. Rendall also indicated that there were delays in completing total financing caused by skeptical reports in the media about the viability of the Solv-Ex bitumen extraction process. Ex. 812, ¶ 3. Mr. Rendall further stated that "it has been necessary for us to adapt to the new circumstances in order to begin generating positive cash flow early next year and reach full production of pipelineable oil products later in the year." Id.

22. In the August 26, 1996 conference call, Mr. Rendall reported that construction was continuing and expressed the belief that Solv-Ex had the funds available to get into cash flow in the first quarter of 1997 if the plant was commissioned. Ex. 813, pp. 4-5.

23. At about this time, Solv-Ex realized they could not afford a visbreaker, so they decided to try to filter the bitumen to produce a much coarser product. Unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." Logwinuk video testimony.

24. To be salable, the bitumen recovered from oil sands must contain no more than .5% solids after it is separated from the sand. Ex. 20. To be pipelineable, bitumen must be "residue free." Ex. 104; Logwinuk trial testimony. Bitumen which cannot be transported by pipeline must be transported to buyers by truck. Exs. 104, 106.

25. In an August 26, 1996 letter to shareholders, Mr. Rendall stated that, although Solv-Ex still intended to produce "in excess of 14,000 per day of pipelineable oil ... in 1997," the company would instead commence production in early 1997 of "100,000 barrels per month" of filtered bitumen which would e "readily marketable" as a means of generating cash flow. Ex. 20. He publicly announced in the August 26, 1996 letter that Solv-Ex had now established through internal and independent testing that it could consistently produce filtered bitumen from Lease 5 which met the .5% solids specification necessary for marketability without using the visbreaker. Id. This

statement was without factual support and misleadingly optimistic as the independent lab work on filtration performed for Solv-Ex in August 1996 was not conducted on material from Lease 5; rather, it was conducted on a reconstituted material made from previously-processed oil sands extracted from a location outside Lease 5. Metcalf I, 140-143; Ex. 112. Nor did the results of those tests justify the conclusion Solv-Ex could consistently produce "readily marketable" bitumen through filtration.

26. Both Campbell and Rendall knew the letter of intent with Gibson required a visbroken product and that they had not even presented, much less executed, a marketing arrangement for the filtered bitumen. However, they failed to disclose that they had no proven way to filter the bitumen and that they had no marketing agreement to sell the filtered product even if they could produce it. The failure to disclose these facts was material and made the August 26 letter to shareholders misleading.

27. On October 1, 1996, Solv-Ex first submitted an order to the Mott Corporation to begin design and then construction of a 44-inch filter for installation at the Lease 5 plant in hopes it could be used to filter the bitumen on a production level. This was completely unproven technology. Nonetheless, in the October 18, 1996 conference call, Mr. Rendall stated that he saw no delays to the company's targets for complet-ing the oil extraction plant for commissioning in the first quarter of 1997. Ex. 824, p. 1.

28. In an October 14, 1996 telephone conference call with investors, securities analysts and broker-dealers, Mr.

Rendall reiterated that production of filtered bitumen would commence during the first quarter of 1997. Ex. 25. During the same conference call, Mr. Campbell stated that the bitumen to be produced would meet "commonly accepted specifications, both in terms of contained water and solids." Ex. 25, p. 3. Given that sand from Lease 5 had never been processed and Mott had only been retained to begin to design a completely untested filter only two weeks earlier, these statements were without factual basis and completely unrealistic Both Campbell and Rendall failed to disclose they had no proven technology to filter Lease 5 bitumen or a committed marketer for such a product.

29. On October 28, 1996, Solv-Ex announced that it was "on target to achieve production of heavy oil during the first quarter of 1997" at Lease 5. Ex. 26A. In the press release, Solv-Ex characterized the anticipated start-up as "a 'major milestone' which will establish the capabilities of its technology on a fully operational basis." Ex. 26A.

30. On November 27, 1996, Solv-Ex reiterated that it was currently constructing its Lease 5 plant, "with production scheduled for the first quarter of 1997." Ex. 29.

31. When it is clear the 44-inch production scale filter could not be designed and constructed in time to meet the widely publicized production schedule, Mr. Rendall directed Solv-Ex personnel to order a prototype 24-inch diameter Mott filter in November 1996. Fox video testimony.

32. In the December 3, 1996 conference call, Mr. Rendall

stated:

> "[W]e are still on track with production of oil. Our schedule is for oil in the first quarter of 1997, and testing of the log washer with its ancillary fines reduction equipment will occur in December and January. Plus we are within our budge...[W]e plan to establish our pipelineable crude product by the fourth quarter of 1997, using a hydrovisbreaker ...[A]s to the oil itself, the quality of the oil is exactly as currently being marketed by Gibson in the market."

Many aspects of this statement are false. Without proven technology, there was no realistic possibility the testing could occur in December or oil production in the first quarter of 1997. There was also no evidence Solv-Ex was or could produce the quality of oil currently being marketed by Gibson.

33. In response to a question as to whether Gibson had made any financial commitment during the same conference call, Mr. Campbell said, "Gibson is, in fact, moving forward towards securing equipment for the purpose of moving Solv-Ex's product to market." This was a false statement as Gibson had no marketing agreement with Solv-Ex and never indicated it was procuring such equipment. (To the contrary, since a pipeline was proposed for the near future, Gibson had already concluded a substantial investment in trucks was not prudent.)

34. During the December 3, 1996 conference call, Mr.

Rendall also stated that "we have a $13 million contingency to keep to our original oil production schedule." He further stated, "...please remember that the successful operation of our plant in the first quarter is planned to bring in a revenue stream of $1 million per month, rising to $4 million by the third quarter." Also during the December j3, 1996 conference call, Mr. Rendall stated, "...we plan to establish continuous operation of three logwashers, two of which will be installed in December of this year." Exs. 831, pp. 1, 2, 3; 30. This was materially false and misleading as the internal Solv-Ex objective as of December 1996, as communicated by Mr. Rendall to company personnel, was only to install one of the logwasher trains, and demonstrate that it could be operated to produce bitumen in some amount or separate some amount of bitumen from sand by the end of March 1997. Moreover, two weeks later in mid-December 1996, portions of only one logwasher train were on site. Ex. 30; Fox video testimony.

35. In spite of his statement in the December 3, 1996 conference call, Mr. Campbell first began negotiating an actual contract allowing Solv-Ex to sell filtered bitumen to Gibson in January or February of 1997.

36. On January 8, 1997, Solv-Ex concluded tests of the 4-inch filter on Lease 5 bitumen at the Albuquerque pilot plant; these tests actually revealed various operational problems and failed to produce bitumen meeting the .5% solids specifications. Exs. 111, App. B; 113.

37. In the January 10, 1997 conference call, Mr. Rendall stated Solv-Ex's objectives for 1997, among which

were "establishing the capacity of one logwasher in the first quarter of 1997." Ex. 832, p. 1. He made his statement without disclosing the complete failure of the mini-model filter tests just two days before. Rendall also stated:

> Around the middle of February, when the plant is available for testing, we intend to test it with twelve test runs. We have defined the conditions of each test run. That would involve about 500 barrels a day initially, in February. Once we establish the conditions for continuous testing, we expect in March to be running at the rate of about 100,000 barrels a month.

Ex. 832, p.5.

38. In a January 10, 1997 conference call with investors, securities analysts and broker-dealers, Mr. Rendall reiterated that "[t]he full plant is expected to be completed around the middle of February for testing, and continuous production is planned for March." Ex. 31, p. 10.

39. In the January 21, 1997 press release, Solv-Ex stated that it is "well positioned to achieve its objectives...and is moving towards production of oil (bitumen) during the first quarter of 1997 from a plant currently under construction on its oil sands lease in Alberta." ex. 835, ¶¶ 7-8.

40. In the February 10, 1997 conference call, Mr. Rendall represented the status of the oil extraction plant in the

following terms:

> Originally, we had planned to test the unit, extraction unit, which is in place, in February. We now have decided to move forward to the complete plant being available for shakedown and production in a continuous basis as a more appropriate way in which to handle this plant. The plant is a big plant, needs to be shaken down, and started up and not stopped. We have a team up there in training so that when the startup and shakedown occurs, we're ready for it. March for startup.

Ex. 839, p. 1 (¶ 10). Mr. Rendall further stated, "What we have to establish in the first quarter [is] that the equipment is lined up to produce the oil [and that] will produce a marketable oil. We are very confident the process works, and it works remarkably well. We just have to shake down the equipment to establish it." Id. at p. 5. This is a material misstatement since there was no factual basis from which Rendall could conclude the process worked at all at the production level much less "remarkably well." It is also inaccurate in that most of the full scale equipment had not even been installed, much less operated to actually produce a marketable product. Mr. Rendall was also aware that the filtration problems continued and no bitumen meeting Gibson standards had ever been produced from Lease 5.

41. In the February 25, 1997 conference call, Mr. Rendall voiced his opinion that "this thing will run immediately" and "[w]ithin a day I'll be producing

good oil," but "it's not a fact until I do it." Ex. 842, p. 7 (¶ 5). Also, he reiterated the goal of "[m]arketable oil by the end of the first quarter." Id., at p. 2 (¶ 9). This hyperbole could be excused except that it fueled the unrealistic expectations created by Rendall's earlier misrepresentations.

42. In the March 6, 1997 press release, Solv-Es stated that it "expects to commence oil production form its first-stage plant in Alberta before the end of March 1997." Ex. 846, ¶ 1. According to the project manager, Steve Lane, "all equipment required for primary extraction of heavy oil (bitumen) is in place and work is totally proceeding on schedule to complete final electrical, piping and instrument installations." Id., at ¶ 2. This is misleading as it fails to disclose this equipment was experimental and no proven product has even been produced.

43. On March 29, 1997, Solv-Ex personnel attempted the first test of the equipment at the Solv-Ex Lease 5 Alberta site. Ex. 111, App. F. At a very early point in the March 29, 1997 test of the plant, Solv-Ex personnel determined that modifications in the water circulation and clarification circuit at the Alberta plant would be needed to achieve continuous operations. Ex. 111, App. F. Moreover, as of March 29, 1997, no installation of automatic instrumentation to record temperature, steam pressure and flow rates during the bitumen extraction process had been completed so production scale operation was still purely theoretical.

44. During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of

the logwasher train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of the fine particle solids, the filters were "blinded" and the logwasher had to be shut down after just 12 hours of operation. Ex. 111, App. F; Fox video testimony. Messrs. Campbell and Rendall were both aware the filtration problem had forced the shutdown. Recognizing this would make all prior bitumen production predictions completely impossible, Mr. Campbell told Mr. Rendall the NASDAQ and others were expecting production by the end of March, so they better issue a statement. After numerous conversations with Mr. Rendall, Mr. Campbell drafted a press release at 6:00 a.m. on March 31, 1997 and faxed it to NASDAQ. Solv-Ex announced that "bitumen production had commenced" at its Lease 5 oil plant. Ex. 35A. This was a material misstatement clearly designed to mislead investors.

45. In an April 7, 1997 conference call, Mr. Rendall stated, "...we have produced oil in a commercially-sized module on our lease in the Athabasca oil sands of Canada." He represented the plant as "operational." He concluded, "Our oil process works in a commercially-sized module." Ex. 851. This was a material misrepresentation of fact designed to mislead investors.

46. It was not coincidental that on April 15, 1997 Solv-Ex announced it had "placed" $22 million in debentures which could be converted into Solv-Ex common stock. Ex. 853.

47. Following the March 29, 1997 start-up of the Lease 5 logwasher, both Messrs. Campbell and Rendall knew

Solv-Ex operated the logwasher only for an isolated test and demonstration runs of no more than six hours. Neither took any action to correct the overly optimistic predictions they had made with regard to the timing or amount of production from the Alberta plant.

48. Following several unsuccessful attempts during early April 1997, Solv-Ex personnel first obtained a measurable amount of filtered Solv-Ex bitumen at the Lease 5 plant using the 24-inch prototype Mott filter on April 21, 1997. Exs. 108, 110, 111; Fox video testimony.

49. After two to three cycles of operation of the prototype plant at Least 5 on April 21, 1997, operational problems developed with the logwasher circuit which again required that the system be shut down. Ex. 111, p. 11.

50. The first successful filtration occurred on April 21, 1997, and the amount of filtered bitumen Solv-Ex produced through the use of the 24-inch prototype Mott filter was only two 55-gallon drums. Moreover, the production could not be duplicated. Ex. 110; Fox video testimony.

51. In the April 30, 1997 press release, Solv-Ex reported it was "pleased with the initial testing, the primary extraction circuit worked well in the commissioning process [and] that testing would now be focused on the bitumen cleaning system which follows primary extraction." Ex. 854, ¶ 4. It was also stated the quality of the bitumen produced in primary extraction to date is better than expected. The press release

further stated that "we do not believe we will have difficulty in producing on a continuous basis bitumen which meets market specifications. Our objective is to...be in a continuous operation by the end of May." Ex. 36. There was no factual basis to support any of those statements, except perhaps that relating to the quality, as it does not attribute the "expectation" to any source. These are material misstatements of fact.

52. Solv-Ex was never able to sustain continuous operation of the logwasher or to produce oil at the Alberta plant.

53. Solv-Ex never finalized any marketing agreements with Gibson for any filtered bitumen product from Lease 5 and therefore had no reliable method to market filtered bitumen even if it had been able to produce it.

Minerals

54. In 1994, Solv-Ex announced it had discovered that it could produce bitumen from Athabasca tar sands by a process which did not use solvents and did not generate toxic tailings.

55. In a further effort to ameliorate the environmental impact of mining bitumen, Solv-Ex obtained more than 100 tons of toxic fine tailings (commonly known as sludge) generated by the nearby oil sands processing plant operated by Suncor. Ex. 776, p. 2. From 1992 through 1994, Solv-Ex conducted several laboratory and pilot plant tests on these tailings and discovered some potential to extract and produce minerals and synthetics from them and detoxify the

tailings for acceptable land fill. Ex. 785, p. 4. Solv-Ex also conducted mineral tests on the fine clay derived from oil sands from Lease 5 for gold, titanium and other mineral extracts. Exs. 502-504, 525, 548-550, 729, 732.

56. In August 1993, Solv-Ex announced that the initial phase of testing and evaluation of its program for commercial recovery of metals had been completed by processing about 100 tons of Suncor pond sludge tailings.

57. Soon thereafter, Solv-Ex announced its ability to produce a "unique" form of aluminum oxide (commonly called "alumina") from the oil sands clays. Exs. 11, 33. The alumina would be extracted as a by-product from the tailings produced from processing the bitumen. Solv-Ex touted this form of "co-production" as being both more environmentally friendly and more economically successful than existing methods of bitumen extraction. From at least 1994 to 1999, Solv-Ex made a concentrated effort to make a type of aluminum oxide that was suitable for making metallic aluminum.

58. On October 5, 1993, Solv-Ex announced that roasting of the double salts in the process of producing the alumina generated an intermediate product which had properties suitable for insulation. In January 1997, the company announced it had been issued a patent for this insulation including shaping it into rigid forms. Ex. 32. No market was developed and it was never produced.

59. By December 1994, Solv-Ex had completed the

feasibility study that provided a complete technical and financial description of the project. Ex. 506. The feasibility study: (i) defined the design for a co-production facility on Lease 5 to produce 10,000 barrels per day of pipelineable crude oil ("PCO") and 64,000 tons per year of alumina to be custom smelted and sold as aluminum; (ii) provided detailed estimates of capital and operating costs for the facility (together with projected revenue streams); and (iii) provided a comprehensive analysis of the project as a whole to determine the amount of financing needed for the project. Ex. 506, pp. 1-3, 5-2. Solv-Ex estimated the capital cost of the oil extraction facility at $95 million and the mineral processing plant at $25 million. Ex. 506, p.5-1.

60. The feasibility study stated that it would be subjected to a two-part technical and financial audit in early 1995. The Pace Consultants, Inc. ("Pace"), an independent consulting firm with expertise in hydrocarbon processing and marketing, was retained to review the bitumen extraction and PCO production sections of the planned plant. Ex. 508. Cumming Cockburn, Ltd. was retained to update its January 1994 financial and technical audit for the minerals processing portion of the co-production facility. Ex. 550.

61. Subsequent research further showed that basic potassium aluminum sulfate (BKAS") could be produced frothily residue tailings as yet another intermediate product in the production of alumina. Exs. 549, 589, 596, 602-603, 637A, 638. Solv-Ex compared, and attempted to market, its BKAS as similar to a naturally occurring mineral, Titanium

Dioxide ("Ti02"), the "Rolls Royce" of paper coating and fillers. Solv-Ex renamed the synthetic mineral "Titanium Dioxide Substitute or TI02S."

62. Natural Titanium Dioxide displays superior optical qualities, and consequently sells for roughly $2,000 per ton, compared to much lower prices for other common pigments, such as calcined kaolin ($550 per ton) and precipitated calcium carbonate ("PCC") ($150-200 per ton). Ex. 52, pp. 5-16. Solv-Ex commissioned various tests to show this synthetic mineral had potential applications as a filler in the production of photocopy paper, glossy paper, ink, plastic and coatings. Exs. 653, 692, 699, 701-702.

63. In pursuit of other potential applications of Ti02S, Solv-Ex commissioned testing which resulted in a preliminary report from D.L. Laboratories ("D.L. Labs"), dated July 26, 1996. Solv-Ex, however, had great difficulty in producing sufficient quantities of Ti02S for testing. By September 1996, only minimal quantities of TI02S had been delivered for testing by D.L. Labs, for possible use as a paint additive. Exs. 60; 567. The first test by D.L. Labs showed that the small Ti02S sample delivered did not grind well enough to be acceptable. Ex. 567. The report of D.L. Labs' second test cited the determination that Ti02S "cannot be readily incorporated into [paint] coatings formulations." Ex. 60. D.L. Labs recommended substantial further study. Ex. 588, p. 4.

64. In June 1996, Solv-Ex also had Ti02S evaluated by Utility Development Corporation ("UDC") as a potential filler for plastics. UDC reported that the Solv-Ex product appeared to serve as a potentially

acceptable filler in certain plastic application trials, but recommended different surface treatments so that the product could be a cost effective competitor. It also recommended that Solv-Ex evaluate a finer particle size. Exs. 46, 587.

65. In a September 5, 1996 conference call, Mr. Rendall stated that "[i]n terms of paint [Ti02S] meets the specifications. In the case of fillers for [plastics] resins, it also does." Ex. 816. Any reference to the UDC or D.L. Labs tests which did not support this conclusion was omitted.

66. Pilot plants to produce paper pigments typically cost several million dollars to construct, and must have a capacity of approximately 250 liters. The purpose of the pilot plant is to produce tanker-truck-sized samples, each of some 15 to 20 tons in size, for field trials by paper manufacturers. Gann trial testimony. Solv-Ex attempted to scale up its production of Ti02S in its pilot plant in spring 1997 and to meet specific requirements for particle size. Ex. 72; Metcalf 195-96, 96-97. Solv-Ex was not successful in its attempts to produce Ti02S at the required particle size at the pilot plant level. Ex. 72; Metcalf I, 95-96.

67. As of fall 1996 and continuing to at least March 1997, Solv-Ex's Albuquerque pilot plant equipment was still only capable of making 50 to 100 pounds of Ti02S per day. Nielsen 304.

68. As reported by UDC and D.L. Labs, the Ti02S particles that Solv-Ex produced in its pilot plant reactors remained too large for its anticipated industrial applications. Metcalf I 112-113; Nielsen 160-161, 263. Solv-Ex's attempts to reduce the

particle size Ti02S by grinding it with its own laboratory equipment proved unsatisfactory. Nielsen 160. Although grinding equipment was shown n flow sheets for the proposed minerals plant in Alberta, Solv-Ex never installed or tested the grinding equipment in its Albuquerque pilot plant. Nielsen 263, 315.

69. In a September 6, 1996 press release, Ex. 22, the company announced:

> Progress has been excellent in development of markets for the products, which can be produced from the fine clays, particularly in view of continued testing of the new Solv-Ex cell for production of electrolytic aluminum and independent testing to date of a potassium-based synthetic mineral, which appears quite suitable for the huge filler markets in paper, paint and plastics.
>
> Solv-Ex said that it continues to believe that the fine clays represent a source of minerals and metals which greatly exceed the value of the oil contained in the oil sands and that the tailings can become a tremendous asset rather than a major item of environmental controversy. It has been publicly estimated that more than a billion tons of the tailings, which many observers consider to be highly toxic, will be in place by the year 2010, much of which is in close proximity to the Athabasca River. (Emphasis added.)

At the time of this press release, there was no factual

basis to conclude TI02S was "quite suitable for the huge filler markets in paper, paint, and plastics." Mr. Campbell prepared the press release and knew of no data to support these conclusions. Even if he quoted Mr. Rendall, which he gave no indication of, a corporate officer should not be allowed to publish material misrepresentations without any legal responsibility.

70. In May 1996, a Solv-Ex consultant, Dr. George Ionides, issued the "Papermaking Pigments Market Study" to define potential markets for papermaking pigments in the regions of North America, which could be economically served by the Solv-Ex mineral pigment production plant in Alberta. After interviews with four senior paper/pigment industry technical experts, Dr. Ionides concluded that with its "anticipated" properties Ti02S could sell in the range of $600-$800 per ton. Exs. 657, p. 5-16; 662, pp. 1-2. Mr. Rendall testified it could be produced for about $200 per ton.

71. Dr. Ionides arranged for Ti02S to be tested in papermaking trials by William Forester at Western Michigan University ("WMU"). Solv-Ex tested 400 to 450 pounds of Ti02S as a paper filler in formulations for two types of paper on October 2, and 3, 1996 (the "October trial"). Because the amount of Ti02S retained in the uncoated wood free paper had not reached Forester's target level, the WMU tests were inconclusive, and Dr. Ionides requested that WMU re-run that trial according to instructions provided by him. Ex. 54. Subsequent tests were scheduled for November.

72. During the subsequent November trial, because of Ti02S the sheet strength suffered and the paper was very "soft." Ex. 56. The lack of strength was reflected in some breaks in the paper made with the Ti02S filler. Forester 22. During the November trial, the poor retention of the Ti02S also caused a large build-up of the Ti02S filler on the wet end of the paper machine and thus excessive foam. Ex. 56. This prevented the machines from running efficiently.

73. After the November trial, Mr. Forester recommended further testing to determine how to regain the paper strength lost from the addition of the Ti02S. Ex. 56. Mr. Rendall was aware of Mr. Forester's November 4, 1996 recommendations, but did not publicize them or the results of the tests.

74. On or about November 20, 1996, Solv-Ex and Raisio Chemicals ("Rasio"), an international distributor of chemicals, entered into a letter of intent for the purposes of conducting additional tests on Ti02S. Ex. 698, p. 1. The alliance between Solv-Ex and Rasio was announced in Solv-Ex's November 27, 1996 press release. Ex. 830, ¶ 1. The press release stated that "the alliance with Raisio contemplated an aggressive testing schedule which could accelerate plans for commercial production if testing proceeds in line with expectations." Ex. 29. The results of the Forester tests were not disclosed and this was a material omission.

75. At the end of November, Ti02S had not been successfully tested for any commercial application. Nonetheless, in a December 3, 1996 conference call, Mr. Rendall stated:

> (Ti02S) has similar characteristics to titanium dioxide pigment, including its light-scattering properties.
>
> With a view to securing the highest value for this product (Ti02S) which is in coatings for high quality paper, the company has embarked on an aggressive market-driven program with Raisio Chemicals. Thousands of pounds of product from our test center in Albuquerque will be used in various coating formulations in Raisio's multimillion-dollar facilities to produce high-quality paper in the first quarter of 1997. Based on successfully reaching our objectives, the second quarter will involve paper mills, and the third quarter should see hundreds of tons of product from Lease 5 commercially used to secure long-term contracts for continuous production in the fourth quarter of 1997.

Ex. 831, p. 1 (¶¶ 7-8) (emphasis added). This statement was completely hypothetical and overly optimistic since the "Albuquerque center" had not produced thousands much less any significant quantity of pounds of product. Nor was it disclosed that all tests of Ti02S as a paper additive had failed to produce a satisfactory formula.

76. As of January 1997, Raisio merely had performed an "initial evaluation" of but three minute 400-gram samples of Ti-2S as an additive in paper coatings and the Albuquerque test plant clearly did not and could not produce the "thousands of pounds of product" Mr.

Rendall had represented would be tested in the first quarter of 1997. Ex. 58.

77. Solv-Ex never determined a filler or coating application to which Ti02S should be targeted. In the absence of such a target Solv-Ex could not determine what specifications Ti02S would have to meet, much less determine how to achieve such specifications.

78. Solv-Ex never even implemented a reliable cost-effective means of reducing the particle size of Ti02S to meet the requirements for either paper or paint applications. Exs. 61, 63, 590, 604, 606.

79. In the January 31, 1997 press release, Mr. Rendall stated that Solv-Ex's "target is to be in construction of the minerals extraction plant during the first half of 1997 and achieve production before the end of the year." Ex. 837, ¶ 4.

80. In the February 10, 1997 conference call, Mr. Rendall disclosed the plans for production of TI02S at the rate of one ton per month at the Albuquerque pilot plant for testing from April or May, 1997. Ex. 839, p.6 (¶ 3). There was no factual basis that could legitimately support such plans and Mr. Rendall's excessive optimism was intentionally misleading.

81. Solv-Ex's pilot plant never produced a large enough quantity of Ti02S to conduct the necessary production-scale tests for any commercial application. Nielsen 85-86, 211; Metcalf II 185-186.

New Method of Aluminum Production

82. In late 1994, Solv-Ex tested a prototype cell to manufacture industrial grade aluminum from the alumina extracted from the Athabasca clay. The test proved the process was theoretically possible and Solv-Ex decided to upscale to the larger lab size version.

83. In the February 21, 1995 press release, Solv-Ex announced that Pat Davey, a longtime international consultant for aluminum projects of Kaiser Aluminum Corporation, had joined the board of directors to head development of the production of aluminum from the alumina produced by Solv-Ex at the "co-production plant" in Alberta, Canada. Ex. 764. In the press release Mr. Davey is quoted as saying:

> The alumina produced using the Solv-Ex technology is extremely high quality and can offer significant opportunities, as well as production efficiencies and environmental benefits, for existing smelters. The possibility of further expanding our horizons through use of this alumina in a new type of electrolytic cell is particularly exciting...

In that press release Solv-Ex also disclosed:

> For about a year, work has been under way at Solv-Ex on new cell design and technology, which has been demonstrated at laboratory scale. Patent applications have been filed, and Solv-Ex plans to build and operate a cell capable of producing one to two pounds of aluminum per hour at its Albuquerque plant.

84. In a presentation at a professional conference held on April 3, 1995, Solv-Ex described the general process of how alumina could be produced from clays contained in the Athabasca oil sands. Ex. 765. The proposed 10,000 barrel per day Solv-Ex oil facility was to produce between 64,000 to 100,000 tons pre year of such alumina. Id., at p. 3, slide 23 (at p. 588031).

85. In a May 8, 1995 conference call, Mr. Rendall stated:

> [W]hat I'm doing now is lining up the pilot plant here to produce one to 200 pounds of alumina, and one to 200 pounds an hour of other products. So that I've got it market in tonnage, so that when I kick off the sludge project at the end of this year, I have sold everything, that this solves cash flow problems.

Ex. 767, p.6.

86. In the June 5, 1995 conference call, Mr. Rendall stated that Solv-Ex is on track for the alumina project and that the production goals remain unchanged. Ex. 771, p. 4.

87. In the August 1, 1995 Management Letter to Shareholders, Ex. 776, p.2, Mr. Rendall summarized the projected plan for the Synthetic Minerals Plant:

- Up to 100,000 tons per year of alumina products
- Up to 200,000 tons per year of synthetic minerals from waste

- Capital estimated at $20 million for initial production - expansion at $15 million
- Marketing for synthetic minerals by ITC Corp.
- Cash flow in early 1996
- Complete review and audit of feasibility by Cumming Cockburn, Ltd.
- Projected operating costs of $25 per ton for all products
- Permits expected in September
- Experienced project management in place

88. On August 2, 1995, the Solv-Ex aluminum team completed the "Start-up and Operating Procedures" for a "2700 Ampere Pilot Cell." Ex. 755. The overall purpose of the test was to determine whether Solv-Ex alumina (to be produced from actual Lease 5 tailings) could produce metallic aluminum at 750°C in a more efficient vertical configuration of the anodes and at approximately 200°C lower than the temperature needed in existing commercial cells. If successful, both of these would be major breakthroughs in the production of aluminum since a large part of the cost of production derives from the dual costs of anode replacement and electricity.

89. In the August 28, 1995 press release, Solv-Ex announced that it had entered into a memorandum of understanding with Glencore, Ltd. (the world's largest trader of metallurgical grade alumina) for initial marketing of metallurgical grade alumina to be produced from oil sand tailings on Solv-Ex Lease 5. The announced agreement contemplated a $10 million advance to assist in project financing. Ex. 778, ¶ 1. However, no advance was ever made as definitive agreements were not reached by the October 31, 1995

deadline. Ex. 783, ¶ 2. This was never publicized by Solv-Ex.

90. On or about December 8, 1995, the Solv-Ex aluminum cell team attempted to start the prototype electrolytic cell, but they were not able to reach a high enough temperature with internal heaters to process the Solv-Ex alumina and cancelled the experiment after 48 h ours. Vondrak Ex. 4, Ex. 1082.

91. The stated objectives of the test were:

i. To verify that electrolysis of an Alumina suspension in the alumina saturated low-temperature eutectic NaF-A1F3 electrolyte is practicable on a large scale.

ii. To operate the Pilot Cell to develop operating parameters and procedures.

iii. To determine the physical and electrical characteristics of the electrolyte.

iv. To determine the effect of electrolyte composition and contained alumina variations on cell operation.

v. To determine material losses and air pollution control requirements.

vi. To determine production efficiencies.

vii. To verify cell and electrode construction, heat balance and electrode life.

viii. To develop a nonconsumable anode.

Ex. 755, p. 1. While the team arguably had some very limited success on (i) and (ii), the remaining goals were not even partially met. Vondrak pp. 86-91.

92. In the 1995 Form 10-K, Solv-Ex announced that:

> Work performed...at (its) Pilot Plant has resulted in production of alumina which meets specifications for metallurgical grade alumina ... through standard ... processes. Evaluation of the Company's process by both independent consultant and sources with the alumina/aluminum industry has confirmed the ability to achieve these results within projected operating costs.
>
> ****
>
> Although considerable work must be performed to determine total feasibility of the process (for producing aluminum meta [as opposed to alumina]), the results of testing to date have been very encouraging and the Company has applied for patents with respect to the new process.

Ex. 863 at 10 ¶ 5; 13 ¶ 3 (emphasis added). These statements were designed to mislead investors as no quantity of alumina was, or could be, produced "which meets specifications for metallurgical grade" and certainly not through anything approaching "standard processes." Nor was there any evidence

either the Company or an independent consultant had confirmed this could be done at competitive costs.

93. On January 18-19, 1996, Solv-Ex again attempted to operate the prototype electrolytic cell. Solv-Ex personnel began heating the cell on January 18, 1996, and the heating system again failed. Ex. 75. Solv-Ex shut down the cell after it began leaking electrolyte a second time, the cell experienced arcing (electrical shortening through sparks), and the cell temperature dropped below the required operating level. Vondrak p. 65; Ex. 75, pp. 533002, 533004-5; Kennedy p. 42.

94. Solv-Ex shut down the operation to prevent the cell from damaging itself further through the arcing and cooling. Kennedy p. 45. The copper anodes used in the prototype cell were destroyed during the test. Ex. 76, pp. 534002, 534004, 534008; Kennedy p. 86. At the time of the test and during the autopsy of the cell, Solv-Ex personnel were unable to objectively confirm that the prototype electrolytic cell actually produced any measurable quantity of aluminum during the test. Vondrak pp. 90-91; Exs. 76, pp. 534012-13; 757 Strahl letter. In short, the test was an unmitigated failure.

95. The summary section of Solv-Ex's internal autopsy report on the cell test states that the "[a]utopsy of the 2700 Ampere Pilot Cell indicated serious problems in the materials used and construction of the cell." Ex. 76, p. 534002. A letter attached to the internal autopsy report states that "[t]he existing cell design served its purpose in showing how difficult it is to design a new process without full appreciating its complexity. We have learned that both the materials

of construction used and the existing design are incapable of sustained operation." Ex. 76, p. 534010.

96. The outside expert, Dr. Erwin Strahl, retained by Solv-Ex to create and control the electrolyte bath in the cell, concluded "as a result of our testing to date and the autopsy observations, some very fundamental problems need to be readdressed." Ex. 757.

97. Had the test of the prototype 2700 ampere electrolytic cell been a success, the process engineer at Solv-Ex would then have recommended the building and testing of a prototype 10,000 ampere cell. Vondrak pp. 94-95. Rather than advancing to the 10,000 ampere cell, however, after the test of the prototype 2700 ampere electrolytic cell, the process engineer and chemical engineer jointly proposed reducing laboratory tests on the cell back to laboratory bench scale where they had experienced some limited success in 1995. Vondrak p. 91; Ex. 76, p. 534013.

98. On January 23, 1996, Solv-Ex issued a press release authored by Herbert Campbell. (Ex. 11). It says *inter alia*:

> Solv-Ex has successfully completed initial testing of its new aluminum reduction technology and prototype electronic cell, Solv-Ex Chairman and Chief Executive Officer John S. Rendall announced today. The Solv-Ex cell was operated at a temperature of 750 degrees centigrade, which is more than 200 degrees centigrade lower than used in existing aluminum smelters. The test used no consumable

> electrodes and a unique grade of highly porous alumina which is produced at the company's test facility in Albuquerque.

These statements are false and misleading. The December 1995 and January 1996 testing could not be considered "successful" by any accepted definition of the term and Mr. Rendall knew facts directly contradicting such an assessment. The statement is also misleading in referring to the lower temperature because the process produced no measurable quantity of aluminum and the "nonconsumable electrodes" were in fact consumed. Based on the technical nature of these tests and Mr. Campbell's attribution of the conclusions to Rendall, Campbell may be excused from responsibility for propagating these falsehoods. (Tr. 932-7; 950). However, at least by the following day, Campbell became aware the cell had sprung a leak during the test and had to be shut down. (Tr. 956-8) Following the autopsy of the cell, neither Mr. Campbell nor Mr. Rendall took any action to correct the misrepresentation of success created by the January 23, 1996 press release.

99. Solv-Ex issued another press release on February 26, 1996 stating, among other things, that "[f]inally, our new cell for commercial operations (which will now be proven in the field) involves panels of about 6'0" x 6'0" compared with the approximate 2'0" x 2'0" panels we are currently working with in Albuquerque. The scale-up factors are quite reasonable." Ex. 13, p. 3. This is a complete distortion of the actual facts as the cell tests were in reality being scaled back to bench scale and not up to production scale. This document was apparently drafted by Mr. Butler and revised by

Mr. Campbell.

100. Solv-Ex then issued a March 11, 1996 press release stating, "The primary mineral of interest in the clays is alumina, and Solv-Ex announced in January 1996 that it had successfully tested a new design of an electrolytic cell to produce aluminum metal from the alumina." Ex. 14 I (emphasis added). BY any objectively reasonable definition of "successful," this was completely untrue.

101. In an August 26, 1996 letter to Solv-Ex shareholders, Mr. Rendall wrote that "[w]e have made further progress since the cell was first tested successfully in January of this year and we see no 'show-stoppers' in proceeding to installation of one or more commercial cells as soon as the mineral extraction technology has been demonstrated on a commercial basis." Ex. 20.

102. In the September 5, 1996 conference call, Mr. Rendall stated that "[w]e are getting the aluminum cell working continuously. We have proven out a dimensionally stable anode. We intend next year to have a prototype working to put up a commercial plant." Ex. 816, p.6 (¶ 12). An "aluminum cell working continuously" never existed and this is a total fabrication intended to mislead investors.

103. In the September 10, 1996 press release, Mr. Rendall stated that Solv-Ex received a patent for the new electrolytic cell first "successfully" tested in January 1996. Ex. 818, ¶ 1. He also stated that Solv-Ex had made "significant headway in confirming the ability to utilize nonconsumable anodes on a consistent basis." Id., at ¶ 2. There is no believable evidence of the

ability of Solv-Ex to create test or use nonconsumable anodes.

104. In the December 3, 1996 conference call, Mr. Rendall stated, "We have further developed an aluminum cell to the stage of continuous production with a nonconsumable anode at bench scale." Ex. 831, p.2. This was also a material misstatement of fact.

105. Solv-Ex never produced or successfully developed a nonconsumable anode for production of metallic aluminum. Kennedy pp. 91-92.

106. Rendall, Campbell and Solv-Ex never disclosed to the investing public that after the test of the prototype 2700 ampere cell, Solv-Ex was forced to scale back its testing to laboratory scale.

107. Solv-Ex's 10-K and amended 10-K for the period ending June 30, 1996 contained misleading statements regarding the status of Solv-Ex's aluminum reduction cell testing and technology. Exs. 40, 40a.

Summary

108. John Rendall had a dream to revolutionize the two industries in which he had worked: bitumen extraction and aluminum production. That dream blinded him to the practical scientific impediments to the fulfillment of that dream. When confronted with negative results, "he would have a tendency to ignore that information or work around it or repeat the experiment over and over and over again." Metcalf p. 221.

109. Collectively read, the press releases, shareholder letters, and other statements, which Defendants disseminated on a virtually weekly basis, created the false impression that Solv-Ex was on the verge of generating revenues from the alumina, Ti02, and bitumen production. In fact, the evidence demonstrates that at the time many of these statements were disseminated, Solv-Ex was in various stages of research and development with respect to the three technologies, but that commercial exploitation of any of them was never more than a theoretical possibility, and this was never disclosed.

Conclusions of Law

1. At all times relevant to the complaint, Solv-Ex was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act").

2. Solv-Ex was therefore required to file periodic reports with the Commission pursuant to Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

3. In enforcement actions, the Commission "appears...not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2nd Cir. 1975).

4. This enforcement action involves a pattern of statements issued by a public company and its two key executive officers that created the misleading

impression that each of three revolutionary new technologies being developed by the company was a virtually unqualified success. The pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with substantial revenue stream, was not only assured, but would occur in the very near future.

5. Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. 240.10b-5] and Section 17(a) of the Securities Act of 1933

("Securities Act") [15 U.S.C. § 77q(a)] prohibit persons and entities from, among other things, making material misstatements or omitting to state material facts in connection with the purchase or sale of any security. Clegg v. Conk, 507 F.2d 1351 (10th Cir. 1974); see generally Thomas Lee Hayen, 2 THE LAW OF SECURITIES REGULATION § 13.2 p. 461 (3rd ed.).

6. A statement is material if a reasonable investor would consider it important in determining whether to buy or sell a stock. Grossman v. Novell, Inc., 120 F.3d 1112, 1119 (10th Cir. 1997). "Material facts include those 'which affect the probable future of the company and those which may affect the desire of investors to buy, sell or hold the company's securities.'" SEC v. Mayhew, 121 F.3d 44, 52 (2nd Cir. 1997) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2nd Cir. 1968)); See also Folger Adam Co. v. PMI Indus., Inc., 938 F.2d 1529 (2nd Cir.), cert. denied, 502 U.S. 983 (1991). An

omission is material if there is a "substantial likelihood" that either "the omitted fact would have assumed actual significance" in the investment decision or "the omitted face would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Misrepresentations and omissions concerning the status and success of the development of commercially feasible core technologies for a development stage company having no revenue and no products are facially material. See Kaplan v. Rose, 49 F.3d 1363, 1374 (9th Cir. 1994) (misleading to use term "successful" to describe test results generally inconsistent with success); see also SEC v. International Chem. Dev. Corp., 469 F.2d 20, 26 (10th Cir. 1972) (material omission not disclosing that patents were not proven commercially feasible).

7. When management and directors are parties to a securities fraud, the test as to causation is whether the facts not disclosed or disclosed in a misleading fashion significantly altered the total mix of information available. IIT, an Int'l Inv. Trust v. Cornfield, 619 F.2d 909 (2nd Cir. 1980). The false statements by the Defendants and their failure to disclose the full test results and reports of their consultants significantly altered the total mix. The Defendants' repeated issuance of press releases, which stated only the positive aspects of such tests, misled the investing public; especially because no corrective information was never disseminated.

8. "The misleading, misrepresented or untruthful character of the release may appear from the nature of

the statement considered above, or, when the facts are fully disclosed, from the half truths, omissions or absence of full candor concealed therein." Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 97 (10th Cir. 1971); Gilbert v. Nixon, 429 F.2d 348, 356 (10th Cir. 1970); Rogen v. Ilikon Corp., 361 F.2d 260 (1st Cir. 1966).

9. Scienter connotes an intent to deceive, manipulate or defraud. City of Philadelphia v. Fleming Cos., 269 F.2d 1245 (10th Cir. 2001); "One is not to be held liable...because of his misleading misrepresentation or omission of material fact, the truth of the matter being unknown to the purchaser, if the party responsible for the misrepresentation or omission sustained the burden of proving that he did not know, and in the exercise of reasonable care could not have known that it was a misrepresentation or omission." Clegg v. Conk, 507 F.2d at 1358. However, "there is a strong inference of scienter when defendants publish a statement known to be false or so contrary to available information as to suggest fraud." Florida State Bd. of Admin. v. Green Tree, 270 F.3d 645, 665 (8th Cir. 2001). When a group of inside officials contributes to documents such as annual reports and press releases, each must assume responsibility for material misstatements. In re Gleufield, Inc., 60 F.3d 591, 593 (9th Cir. 1995) (per Kelly, J.); Holtman v. Aura Sys., 844 F. Supp. 549 (C.D. Cal. 1993). See F.F. 92. The statements of corporate officials are of particular importance to investors; the investing public "justifiably places heavy reliance on the statements and opinions of corporate insiders." In re Apple Computer Sec. Litig, 886 F.2d 1109, 1116 (9th Cir. 1989). This would seem especially applicable to the

officers of Solv-Ex since Campbell, Rendall, and, to a much lesser extent Butler, were responsible for the constant disclosure of all information to the financial markets. F.F. 39, 42, 51, 100.

10. Mr. Rendall made several intentional misstatements of material fact. See F.F. 25, 32, 34, 40, 44, 45, 65, 75, 98, 103, 104.

11. Mr. Campbell also intentionally made several misstatements of material fact. See F.F. 28, 33, 44, 92, 99.

12. A duty to disclose technical or developmental problems with a produce may arise where a company makes strongly optimistic or concrete statements about that product that are in stark contrast to its internal reports. Glassman v. Computervision Corp., 90 F.3d 617, 635 (1st Cir. 1996); Kaplan, 49 F.3d at 1374 (defendant's use of term "successfully" to describe test results was inconsistent with common understanding of the term without more information). The duty to speak the full truth thus arises when Defendants make affirmative representations. Rubinstein v. Collins, 20 F.3d 160, 170 (5th Cir. 1994); Hadsell v. Hoover, 484 F.2d 123 (10th Cir. 1973); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d at 100.

13. Mr. Rendall omitted material facts in several instances in which he calculated the revelation of the whole truth would negatively impact Solv-Ex in the investment markets. See F.F. 26, 28, 37, 40, 74, 75, 98.

14. Mr. Campbell also omitted material facts when he calculated the revelation of the whole truth would negatively impact Solv-Ex in the financial markets. See F.F. 26, 28.

15. Representations pertaining to future events can be the basis of fraud when the defendant knows there is no reasonable factual basis for the representations or the speaker knows of undisclosed facts tending to seriously undermine the accuracy of the statement. In re HealthCare Compare Secur. Litig., 75 F.3d 276 (7th Cir. 1996); Rubinstein v. Collins, 20 F.3d at 166; In re VeriFone Secur. Litig. 11 F.3d 865, 870 (9th Cir. 1993); Bloomenthal and Wolff, 3D SECURITIES AND FEDERAL CORPORATE LAW § 20:4 p. 20-5 (1999).

16. Mr. Rendall's predictions as to future events were material misstatements of fact in that they were made without any factual support and/or in the face of contradictory and undisclosed factual evidence. See F.F. 25, 32, 34, 40, 75, 80.

17. Mr. Campbell's prediction of future events was a material misstatement of fact made without factual support and/or in the face of contradictory and undisclosed factual evidence. See F.F. 28.

18. John Rendall was vested with the power to direct and control, and did so, all aspects of Solv-Ex's business and was therefore responsible for Solv-Ex's misleading and incorrect statements in the official filings. As a control person of Solv-Ex pursuant to Section 20(a) of the Exchange Act, Mr. Rendall is directly liable for the company's reporting violations

under Section 13(a0) and the rules thereunder. See Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2nd Cir. 973) (persons who have actual authority to direct the activities of the primary wrongdoer and have culpable participation in the activities are control persons within the meaning of Section 20(a)). See also Arthur Children's Trust v. Keim, 994 F.2d 1390, 1396-97 (9th Cir. 1993) (members of management committee were control persons because they made major business decisions affecting the venture).

19. Herbert Campbell was also a control person and had access to all of the negative tests and consultants' caveats which he chose to largely ignore in drafting the press releases which created a misleadingly optimistic picture of the prospects for each of the three Solv-Ex technologies. See Mitchell v. Texas Gulf Sulphur Co., 446 F.2d at 90.

20. Mr. Campbell was aware of facts from which he knew or should have known the prototype electrolytic cell leaded during the January 18, 1996 test, and was not the "success" he claimed in the January 23 and February 26, 1996 press releases. United States v. Schaefer, 299 F.2d 625 (7th Cir. 1962) (willful ignorance unavailing when others relying on representations of fact). See F.F. 98. Mr. Campbell knew or should have known that the information in Solv-Ex's 10-K filing was false or misleading. United States v. Benjamin, 328 F.2d 859, 861 (2d Cir. 1964) (corporate attorney cannot deliberately close his eyes and recklessly state as facts things he was ignorant of). See also Matter of Edward F. Duffy, 1995 WL 786625 (SEC 1995) (holding corporate attorney responsible for corporate press releases and

securities filings he participated in). F.F. 92, 99. Even had his role at Solv-Ex been limited to that of corporate counsel, however, Mr. Campbell's conduct would be recklessly violative of the federal securities laws in that he both knew and was reckless in failure to verify erroneous factual statements he drafted. Rubin v. Schottenstein, Zox & Dunn, 143 F. 3d 263, 267 (6th Cir. 1998) ("[T]here is nothing special about [the defendant's] status as an attorney that negates his Rule 10b-5 duty to disclose, a duty that ordinarily would devolve under Rule 10b-5 upon a third party under these circumstances... An accountant or lawyer, for instance, who prepares a dishonest statement is a primary participant in a violation.") (citing SEC v. Coffey, 493 F.2d 1304, 1315 (6th Cir. 1974)). "Recklessness," defined as conduct that is an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it, can satisfy the scienter requirement for section 10(b), Securities Exchange Act of 1934." City of Philadelphia, 264 F.3d at 1258.

21. Solv-Ex, Rendall, and Campbell violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933.

22. The European "trading program" was never implemented and therefore the restricted stock was never issued, thus no SEC reporting requirements were triggered.

23. Defendants rely on the "bespeaks caution" doctrine to

shield their public statements. The "bespeaks caution" doctrine should be applied very carefully since it provides an incentive to misrepresent the truth. In re Donald J. Trump Casino Sec. Litig. - Taj Mahal Litig., 7 F.3d 357, 371 (3rd Cir. 1993). The cautionary statements in the Solv-Ex filings do not counterbalance the glowing projections in the Defendants' press releases and broker conferences. See Whirlpool Fin. Corp. v. GN Holdings, Inc., 873 F. Supp. 111, 123-24 (Non verbal response)..D. Ill. 1995); In re Colonial Ltd. Partnership Litig., 854 F. Supp. 64, 92-3 (D. Conn. 1994); In re First Am. Center Sec. Litig., 807 F. Supp. 326 (S.D.N.Y. 1992)

24. There is a reasonable likelihood that the Defendants will engage in future violations unless enjoined.

All tendered Findings and Conclusions not incorporated herein are deemed Denied.

DATED at Albuquerque this 24th day of September 2003.

By: s/Bruce D. Black
Bruce D. Black
United States District Judge

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EXHIBIT A 3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs.

SOLV-EX CORPORATION,

Defendant,

and

JOHN S. RENDALL and HERBERT M. CAMPBELL,

Defendants-Appellants.

No. 00-2339
(D.C. No. CIV-98-860-BB)
(D.N.M.)

FILED
United States Court of Appeals
Tenth Circuit

April 15, 2004

PATRICK FISHER
Clerk

ORDER AND JUDGMENT

Before **HENRY, PORFILIO,** and **MURPHY**
Circuit Judges

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R..

36.3.

In this appeal, two officers of a start-up corporation, each now proceeding pro se, challenge the district court's determination that they committed securities fraud through a series of materially misleading public statements.[††] The Securities and Exchange Commission commenced this enforcement action against Solv-Ex Corporation, its CEO John Rendall, and its senior vice president and general counsel Herb Campbell, for alleged violations of § 17(a) of the Securities Act of 1933, § 10(b) and § 13(a) of the Securities and Exchange Act of 1934, and the rules promulgated under those Acts.[‡‡] The SEC contended that, from January 1995

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†† After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

‡‡ Section 10(b) of the Exchange Act (15.U.S.C. # SYMBOL 167 \f "Times New Roman" \s 11# 78j(b)) and # SYMBOL 167 \f "Times New Roman" \s 11# 17(a) of the Securities Act (15 U.S.C. # SYMBOL 167 \f "Times New Roman" \s 11# 77q(a)) are general fraud provisions. Together with Rule 10b-5 (17 C.F.R. # SYMBOL 167 \f "Times New Roman" \s 11# 240.10b-5), they make it unlawful for a person or entity, in connection with the purchase or sale of a security, to employ any device, scheme, or artifice to defraud, to make an untrue statement of material fact, or to omit a material fact that is necessary to make the statement made, in light of the circumstances under which it was made, not misleading. Section 13(a) of the Exchange Act (15 U.S.C. # SYMBOL 167 \f "Times New Roman" \s 11# 78m(a)) requires the issuer of a security to file annual and quarterly reports with the SEC, and Rule 12b-20 (17 C.F.R. # SYMBOL 167 \f "Times New Roman" \s 11# 240.12b-20) provides that required filings with the SEC must include "such further material information, f any, as may be necessary to make the required statements, in light of the circumstances under which they are made[,] not misleading."

through April 1997, defendants issued a series of public statements in press releases, in letters to shareholders, in conference calls with investors, brokers, and security analysts, and in filings with the SEC, that created the misleading impression that each of three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc. 90 at 1.

Following a bench trial, the district court issued a lengthy decision finding that Rendall and Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first-tier civil penalties of $5,000 against each of them and permanently enjoined them from future violations of § 17(a), § 10(b), and § 13(a). This appeal followed.

In an order issued August 4, 2003, this court addressed legal issues relating to the elements of the SEC's case and to the district court's evidentiary rulings, but reserved ruling on other issues pending a limited remand to the district court for further factual findings. The district court issued very detailed and comprehensive amended findings of fact and conclusions of law on September 24, 2003, which it certified to this court as a supplemental record. The parties then filed supplemental briefs addressing the district court's amended findings and conclusions.

We review the district court's findings of fact for clear error, giving "due regard...to the opportunity of the trial court to judge the credibility of witnesses." Fed. R. Civ. P. 52(a). "[R]eview under the 'clearly erroneous' standard is

significantly deferential." *Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 623 (1993). Accordingly, "[w]e will not disturb the district court's findings of fact unless, following a review of the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002) (quotation omitted). Whether Campbell and/or Rendall made misrepresentations or omissions that were material, and whether they did so with the requisite scienter, are both "fact-specific issues." *Schneider v. Vennard (In re Apple Computer Sec. Litig.)*, 886 F.2d 1109, 1113 (9th Cir. 1989). We review the district court's legal conclusions de novo. *Nieto v. Kapoor*, 268 F.3d 1208, 1217 (10th Cir. 2001). Finally, we review the district court's decision to grant injunctive relief for an abuse of discretion. *See SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993).

In addition to the pertinent law, we have carefully reviewed the district court's amended facts and conclusions, the record before us, and all the parties' briefs. Our review establishes that the district court did not err in finding that Rendall and Campbell made public statements that were materially misleading because they contained material misrepresentations and/or material omissions, and that defendants did so with the requisite scienter. Likewise, the district court did not err in finding that Rendall and Campbell made similarly misleading statements in reports they filed with the SEC. Nor did the district court abuse its discretion in determining, based on all the circumstances, that Rendall and Campbell should be enjoined from future securities violations in addition to being fined for their past violations.

We therefore AFFIRM the judgment of the district court for substantially the reasons set forth in its detailed and

comprehensive amended findings of fact and conclusions of law issued September 24, 2003. Rendall's motion to reconsider our decision not to hear oral argument in this appeal is DENIED. Rendall's motion to require the SEC to file all the trial exhibits of record is DENIED; his amended motion is GRANTED to the extent that it seeks permission to file Exhibit Nos. 20, 25, 885, 886, 887, and 1103 as an additional addendum to his brief.

Entered for the Court

Robert H. Henry
Circuit Judge

EXHIBIT A 4

F I L E D
United States District Court
Albuquerque, New Mexico

May 16, 2000 16:47

s/Robert M. March
Clerk

US District Court
District of New Mexico
Digital File Stamp

Case:	**98cv00860**
Title	**Securities and Exch. v. Solv-Ex Corporation et al.**
Document Type	**Judgment**
Document No.	**127**
Description	**JUDGMENT by Judge Bruce D. Black that Defendants are permanently restrained & enjoined from violation of sections set out; that Rendall and Campbell pay civil penalties of $5,000 each to SEC**

Total Pages	**4**
Exhibits/ Attachment	**0**
Court Signature	**67 27 b6 77 e4 b8 66 63 ef 5a 22 45 f7 3a f6 c5 27 4c 95 48 bd 84 81 44 f3 cb b9 1d b7 dc 1b aa 1e 44 de 6b 0b 25 ba 8d b1 5e a8 33 32 da 48 38 21 78 24 b9 5b b8 34 a2 8f d9 c3 6d 8f 86 51 f3**

This document constitutes an official stamp of the Court and, if attached to the document identified above, serves as an endorsed copy of the pleading. It may be used in lieu of the court's mechanical file stamp for the named document only, and misuse will be treated the same as misuse of the Court's official mechanical file stamp. The Court's digital signature is a verifiable mathematical computation unique to the filed documents and the Court's private encryption key. this signature assures that any change can be detected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. **No. CIV 98-860 BB/RLP**

SOLV-EX CORPORATION, JOHN S. RENDALL, and HERBERT M. CAMPBELL, II,

Defendants.

FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF

THE COURT entered its findings of fact and conclusions of law in this matter, which are incorporated herein by reference, on March 31, 2000. After the parties were unable to agree to a form of judgment, further testimony and evidence was received at a hearing on May 15, 2000. The Court having found that Defendants Solv-Ex Corporation ("Solv-Ex"), John S. Rendall ("Rendall"), and Herbert M. Campbell, II ("Campbell") violated Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)] and Sections 10(b) and 13(a) of the Securities Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(a)], and having concluded that there is a reasonable likelihood that the Defendants will engage in future violations unless enjoined;

Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Solv-Ex, Rendall and Campbell, their officers, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and they hereby are permanently restrained and enjoined from violating Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and Rule 10b-5 by, directly or indirectly, in the offer or sale of any securities by the use of any means or instruments of interstate commerce:

(1) employing any device, scheme or artifice to defraud; or

(2) obtaining money or property by means of any untrue statement of a material fact or omission to state a material fact.

IT IS FURTHER ORDERED that Solv-Ex, Rendall, and Campbell, their officers, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and they hereby are permanently restrained and enjoined from violating Section 13(a) of the Exchange Act by, directly or indirectly, filing or causing the filing with the Securities and Exchange Commission of any periodic report on behalf of any issuer, which contains any untrue statement of material, or which omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

IT IS FURTHER ORDERED that Defendant John S. Rendall shall pay a civil penalty of $5,000 pursuant to

Section 20(d) of the Securities Act [15 U.S.C. § 775(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] within 30 days of the entry of this Final Judgment. Such payment shall be made to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and a cover letter indicating such payment shall be sent to counsel for the Securities and Exchange Commission, Central Regional Officer, 1801 California Street, Suite 4800, Denver, CO 80202.

IT IS FURTHER ORDERED that Defendant Herbert M. Campbell, II, shall pay a civil penalty of $5,000 pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act within 30 days of the entry of this Final Judgment. Such payment shall be made to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and a cover letter indicating such payment shall be sent to counsel for the Securities and Exchange Commission, Central Regional Officer, 1801 California Street, Suite 4800, Denver, CO 80202.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of enforcing this Final Judgment.

There being no reason for delay, the Clerk of the Court is hereby directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

Dated at Albuquerque this 16th day of May, 2000.

By: s/Bruce D. Black
Bruce D. Black
United States District Judge

Counsel for Plaintiff:

Julie K. Lutz, Thomas D. Carter, SEC, Denver, CO
Raymond Hamilton, SAUSA, Albuquerque, New Mexico

Counsel for Defendants:

Richard H. Goldberg, Friedlob Sanderson Raskin Paulson & Tourtillott, Denver, CO
Robert A. Johnson, Karla K. Poe, Eastham Johnson Monnheimer & Jontz, Albuquerque, New Mexico

EXHIBIT A 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

No. 98-0860 BB/RLP
Filed November 2, 2004

SOLV-EX CORPORATION, JOHN S. RENDALL, and HERBERT M. CAMPBELL,

Defendants.

ORDER

Upon consideration of defendant John S. Rendall's motions for retrial under Federal Rule of Civil Procedure 60(b) and to disqualify the trial judge for bias and prejudice under 28 U.S.C. § 144, and attached exhibits; the Securities and Exchange Commission's opposition thereto and attached exhibits; Rendall's reply; the order and judgment of the United States Circuit Court of Appeals for the Tenth Circuit affirming this Court's judgment for substantially the reasons set forth in this Court's amended findings of fact and conclusions of law; the order of the United States Circuit Court of Appeals for the Tenth Circuit denying Rendall's petition for rehearing and petition for rehearing en banc; and the arguments of Rendall and counsel for the Securities and Exchange Commission before this Court, it is, this 29th day of October 2004,

ORDERED that Rendall's motion for retrial under Federal Rule of Civil Procedure 60(b) is DENIED;

And it is further

ORDERED that Rendall's motion to disqualify under 28 U.S.C. § 144 is DENIED.

/s/ Bruce D. Black
United States District Judge

EXHIBIT A 6

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs. **No. 05-2001**
(D.C. No. CIV-98-860 BB/RLP)
(D.N.M.)

SOLV-EX CORPORATION; HERBERT M. CAMPBELL,

Defendants,

and

JOHN S. RENDALL,

Defendant-Appellant.

ORDER AND JUDGMENT
Filed June 16, 2004

Before **O'BRIEN, HOLLOWAY** and **BALDOCK,**
Circuit Judges

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered and submitted without oral argument.

Defendant John S. Rendall, proceeding *pro se*, appeals the district court's denial of his motion for disqualifications and for relief from judgment filed pursuant to 28 U.S.C. § 144 and Fed. R. Civ. P. 60(b)(1), (2), (4), and (6). Rendall contends that the district court judge relied on evidence that did not exist in making his amended findings of facts and conclusions of law in this SEC enforcement action. He further contends that the judge's reliance on evidence not in the record both established his bias and prejudice in tainted all his findings such that the judge should be disqualified and Rendall should be relieved from the judgment finding him guilty of securities violations, imposing civil penalties, and enjoining him from further violations. In particular, Rendall points to five instances in the judge's forty-five page decision in which he referred to a witness's video testimony when that witness actually testified in person at trial, one instance in which he purported to quote from a witness's testimony but did not do so accurately, and one instance in which he cited an exhibit that Rendall contends did not support the factual finding for which it was cited. We exercise jurisdiction under

28 U.S.C. § 1291 and affirm.

Section 144 provides for the disqualification of a district court judge when a party to a proceeding before that judge files a "timely and sufficient affidavit" showing that the judge has "a personal bias or prejudice either against him or in favor of any adverse party." An affidavit filed under § 144 is "strictly construed against the affiant and there is a substantial burden on the moving party to demonstrate that the judge is not impartial." *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992). "The bias charged must be of a personal nature and must be such as would likely result in a decision on some basis other than what the judge learned from his participation in the case." *United States v. Irwin*, 561 F.2d 198, 200 (10th Cir. 1977). Further, "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Human v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987).

Whether to recuse is a decision "committed to the sound discretion of the district court," and we will not reverse a judge's refusal to recuse absent an abuse of that discretion. *Burger*, 964 F.2d at 1070. Based upon our careful review, we conclude that the district court judge properly denied Rendall's motion seeking to disqualify him under § 144. Even if the district court judge did make the errors Rendall cites, they do not suggest in any way that bias or prejudice was at work in the judge's decision.

Because the district court judge properly refused to disqualify himself from the case, it was proper for him to rule on Rendall's motion for relief from judgment under Rule 60(b). To the extent that Rendall challenges the district court's denial of his Rule 60(b) motion on the merits, we generally review that decision for an abuse of discretion. *See*

Servants of Paraclete v. Does, 204 F.3d 1005, 1009 (10th Cir. 2000).

"Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances." *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990). Our review demonstrates that none of the errors cited by Rendall justifies relief from the judgment under Rule 60(b)(1), (2), (4), or (6). Therefore, the district court properly denied Rendall's motion.

The judgment of the district court is AFFIRMED. Appellee's motion for summary dismissal of the appeal is DENIED as moot.

Entered for the Court

Bobby R. Baldock
Circuit Judge

EXHIBITS B 1-3

EXHIBIT B 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs. Civil No. 98-0860 BB/RLP
SOLV-EX CORPORATION,
JOHN S. RENDALL, and
HERBERT M. CAMPBELL,

Defendants.

MOTION FOR RETRIAL BASED ON FEDERAL RULES 60(b)(1)(2)(4)(6) and 28 U.S.C. § 144

Defendant John S. Rendall, pro se, moves this Court for an entry of an order granting a retrial of 98-0860 BB/RLP due to "mistakes" in the Court's using non-existent evidence in its Amended Findings of face and Conclusions of Law to the U.S. Court of Appeals (10th Circuit) on September 24, 2003 (hereinafter referred to as "AFC"). This was accepted by the Appeals Court on April 15, 2004, with *en banc* review not taken up on June 16, 2004. An affidavit of bias and prejudice of the Honorable Bruce B. Black is attached under 28 U.S.C. § 144. As grounds for this motion, Defendant Rendall states as follows:

SUMMARY OF GROUNDS AND REASONS UNDER FED. R. CIV. P. RULE 60 B

"The provisions of this rule must be carefully

> interpreted to preserve the delicate balance between sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice must be done in light of all the facts." *Bankers Mortgage Co. v. U.S.*, C.A. 5th, 1970, 423 F.2d 73, 77, certiorari denied, 90 S.Ct. 2242 399 US 927 26 L.Ed 2d 793.

And, according to Dwight, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2873, p. 438, leave is not required of the Appellate Court as the resolution of the appeal did not divest District Court of jurisdiction to vacate judgment of the trial court.

> "The issue was resolved by the Supreme Court in 1976 in Standard Oil Company of California v. United States. The Court, recognizing that the appellate-leave requirement adds to the delay and expense of litigation, held that the district court may entertain a Rule 60(b) motion without leave of the appellate court."

Standard Oil Co. of California v. U.S., (1976) 97 S.Ct. 429 U.S. 17, 50 L.Ed. 2d 21 and leave not required. DeWeerth v. Baldinger, CA 2d 1994 38 F.3d 1266.

A. Mistakes of Rule 60(b)(1) have occurred in the Amended Findings of Fact and Conclusions of Law to the Court of Appeals on September 24, 2003.

The specific evidence, paragraphs 31, 34, 44, 48, and 50, was stated to be from the video testimony of Dr. J. Fox, which is non-existent. Dr. J. Fox testified in person in the trial. It would be abuse of discretion to deny relief as relief provided by the rule governing relief from the judgment or

order is equitable in nature and it to be administered upon equitable principles. DiVito v. Fidelity & Deposit Co. of Maryland, C.A. 7th, 1966, 361 F.2d 936.

B. Newly discovered Rule 60(b)(2) evidence, disclosed in the Amended Findings of Fact and Conclusions of Law sent to the Court of Appeals on September 24, 2003, left Court of Appeals jurisdiction on June 16, 2004.

Defendant Rendall had no opportunity to appeal the mistakes enumerated in Section I A on the use of evidence not in the record by Judge Bruce B. Black. (Bias and prejudice towards defendant). As stated in Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2862, p. 326:

> "In the 1948 amendments, the time for moving a new trial because of newly discovered evidence was reduced to ten days, but Rule 60(b)(2) was added to allow a motion for relief from the judgment within one year after judgment on the ground of "newly discovered evidence which, by due diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."

C. The Judgment is void as per 60(b)(4), as the trial court reached to evidence not in the record to amend its Findings of Fact and Conclusions of Law dated September 24, 2003.

As stated in Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2862, p. 326:

> "A judgment is not void merely because it is

erroneous. It is void only if the Court that rendered it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with the due process of law." Union Switch & Signal v. Local, 610 C.A. 3d 1990 900 F.2d 608, 612, quoting Wright and Miller.

Use of evidence not in the record taints and voids the entire AFC. See Rendall's Affidavit on bias and prejudice of Judge Bruce B. Black, 28 U.S.C. § 144.

D. The issue of evidence in a September 24, 2003 Amended Finding not in the record by the Honorable Bruce B. Black, is adequate grounds for Rendall to claim bias and prejudice by means of an affidavit attached under 27 U.S.C. § 144 to disqualify the Judge and send the case back for a retrial. The relief is justified under Rule 60(b)(6).

The Court of Appeals has not a rule on this issue in its June 16, 2004 order denying Rendall a hearing as the issue of evidence in findings is for the District Court to make in the first instance. As stated by 28 U.S.C. § 144, the affidavit claiming bias and prejudice has to be filed in the District Court.

The U.S. Supreme Court rulings of "bias and prejudice" as per 28 U.S.C. § 144 in United States v. Grinnel Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1966), control this case.

The result of the judge's disqualification is such that, in fairness and protection of Rendall's Constitutional rights to due process and equity, the order of the District Court enjoining Rendall from future violations of the Securities laws

and imposing a $5,000 penalty must be set aside. Under Fed. R. Civ. P. Rule 60(b)(6), the reason justifies relief as in Klapprott v. United States, (1949) 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266.

II. THE FACTS

A. The Court of Appeals Order of August 4, 2003 remanding back to the District Court for key factual findings. Exhibit B.

1. The COA statement of the case and the issue.

The Securities and Exchange Commission (SEC) brought this enforcement action against Defendant Solv-Ex Corporation, its CEO, John Rendall, and its senior vice president and general counsel, § 10(b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act), and the rules promulgated under those acts. The SEC contended that, from January 1995 through April 1997, defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, the filings with the SEC that created the misleading impression that each of the three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vo. IV, Doc 90 at 1.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that Defendants Rendall and Campbell made material representations and/or omissions in public statements and in filings with the SEC.

The court imposed first tier civil penalties of $5,000 against each and permanently enjoined both men from future violations of § 17(a), § 10(b) and § 13(a). Now proceeding pro se, Rendall and Campbell each appeal. Because the District Court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the District Court to supplement its factual findings.

2. The core issue to be addressed by Judge Bruce B. Black, id at page 4:

Solv-Ex's core technology was bitumen extraction (Id. Page 4) (Exhibit B). For instance, with regard to defendants' representations that commercial-scale production of bitumen had begun at the Alberta plant on March 29, the District Court made the following subsidiary findings: 1) during the March 29 run of the log washer circuit, installation of the automatic instrumentation had not been completed; 2) Solv-Ex personnel determined that modifications in the water circulation and clarification circuit would be necessary to achieve continuous operation; 3) the log washer had to be shut down after only twelve hours due to an unexpected build-up of solids in the pump box; 4) Solv-Ex was not able to filter bitumen successfully at the Lease 5 plant until April 21, 1997, at which time it produced only two 55-gallon drums; 5) Solv-Ex was not able to duplicate the production of filtered bitumen thereafter; 6) after only two or three cycles of operation, the log washer circuit again developed operational problems on April 21, and had to be shut down; 7) in fact, after the log washer was shut down initially on March 29, it was not operated thereafter, except for isolated test and demonstration runs of no more than six hours; and 8) Solv-Ex was never able to sustain continuous operation of the log washer at the Alberta plant.

If we compare these subsidiary findings to the defendants' relevant public statements of March 31, April 7 and April 30, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the District Court found to be material. Materiality is a "fact-specific inquiry" that "depends on the significance the reasonable investor would place on the withheld or misrepresented information." Basic Inc. v.Levinson, 485 U.S. 224, 240 (1988). Findings as to materiality are for the District Court to make in the first instance.

3. The COA basis for the remand, id at page 8.

"Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court's reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those facts are clearly erroneous." Roberts v. Metro Life Ins. Co., 808 F.2d 1387 1390-91 (10th Cir. 1987) (quotation omitted). Here, although the District Court made lengthy findings of fact, there are some important gaps that preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the District Court for further factual findings and explications of its reasoning (as we explained below).

B. The Honorable Bruce B. Black's Amended Findings of Fact and Conclusions of Law dated September 24, 2003 in response to the remand of the Court of Appeals. Exhibit C.

Paragraph 23:

At about this time, Solv-Ex realized they could not afford a visbreaker, so they decided to try to filter the bitumen to produce a much more coarser product. Unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." **Logwinuk video testimony**.

Paragraph 31:

When it was clear the 44-inch production scale filter could not be designed and constructed in time to meet the widely publicized production schedule, Mr. Rendall directed Solv-Ex personnel to order a prototype 24-inch diameter Mott filter in November 1996. **Fox video testimony**.

Paragraph 34:

During the December 3, 1996 conference call, Mr. Rendall also stated that, "we have a $13 million contingency to keep to our original oil production schedule." He further stated, "...please remember that the successful operation of our plant in the first quarter is planned to bring a revenue stream of $1 million per month, rising to $4 million by the third quarter." Also, during the December 3, 1996 conference call, Mr. Rendall stated, "...we plan to establish continuous operation of three log washers, two of which will be installed in December of this year." Exs. 831, pp. 1, 2, 3; 30. This was materially false and misleading as the internal Solv-Ex objective as of December 1996, as communicated by Mr. Rendall to company personnel, was only to install one of the log washer trains and demonstrate that it could be operated to produce bitumen in some amount or separate some

amount of bitumen from sand by the end of March 1997. Moreover, two weeks later in mid-December 1996, portions of only one log washer train were on site. Ex. 30; **Fox video testimony.**

Paragraph 44:

During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the log washer train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of fine particle solids, the filters were "blinded" and the log washer had to be shut down just after 12 hours of operation. Ex. 111, App. F; **Fox video testimony.** Messrs. Campbell and Rendall were both aware of the filtration problem had forced the shutdown. Recognizing this would make all prior bitumen production predictions completely impossible, Mr. Campbell told Mr. Rendall the NASDAQ and others were expecting production by the end of March, so they better issue a statement. After numerous conversations over the weekend with Mr. Rendall, Mr. Campbell drafted a press release at 6:00 a.m. on March 31, 1997 and faxed it to NASDAQ. Solv-Ex announced that "bitumen production had commenced" at its Lease 5 oil plant. Ex. 34A. This was a material misstatement clearly designed to mislead investors.

Paragraph 48:

Following several unsuccessful attempts during early April 1997, Solv-Ex personnel first obtained a measurable amount of filtered Solv-Ex bitumen at the Lease 5 plant using the 24-inch prototype Mott filter on April 21, 1997. Exs. 108, 110, 111; **Fox**

video testimony.

Paragraph 50:

The first successful filtration occurred on April 21, 1997, and the amount of filtered bitumen Solv-Ex produced through the use of the 24-inch prototype Mott filter was only two 55-gallon drums. Moreover, the production could not be duplicated. Ex. 110; **Fox video testimony.**

C. The Honorable Bruce B. Black's original Findings of Fact and Conclusions of Law dated March 31, 2000, Exhibit G.

Paragraph 24:

Contrary to these statements, the independent lab work on filtration performed for Solv-Ex in August 1996 was not conducted on material from Lease 5, rather, it was conducted on a reconstituted material made from previously processed oil sands extracted from a location outside Lease 5. Metcalf I, 140-143; Ex. 112. **Unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." Logwinuk trial testimony.** Nor did the results of prior tests justify the conclusion Solv-Ex could consistently produce marketable bitumen through filtration.

Paragraph 32:

When it was clear the 44-inch filter would not be

ready, Mr. Rendall directed Solv-Ex personnel to order a prototype 24-inch diameter Mott filter during November 1996; **Fox trial testimony.**

Paragraph 46:

During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the log washer train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of fine particle solids, the filters were "blinded" and the log washer had to be shut down after just 12 hours of operation. **Ex. 111, App. F.; Fox trial testimony.** Messrs. Campbell and Rendall were both aware the filtration problem had forced the shutdown.

Paragraph 50:

Following several unsuccessful attempts during early April 1997, Solv-Ex personnel first obtained a measurable amount of filtered Solv-Ex bitumen at the Lease 5 plant using the 24-inch prototype filter on April 21, 1997. Exs. 108, 110, 111; **Fox trial testimony.**

Paragraph 51:

The first successful filtration occurred on April 21, 1997, and the amount of filtered bitumen Solv-Ex produced through the use of the 24-inch prototype Mott filter was only two 55-gallon drums. It could not be duplicated again. Ex. 110; **Fox trial testimony.**

D. The mistakes (evidence not in the record) in the

2003 Amended Findings of Fact and Conclusions of Law of Judge Bruce B. Black dated September 24.

1. Paragraph 23: The quotation of Alex Logwinuk is not in the video testimony presented at trial. (Exhibit D is a certified copy of the transcript).

2. Paragraphs 31, 34, 44, 48 and 50:

a) Jerry Fox's video testimony is non-existent. No such testimony exists.

b) As shown by the original Findings of fact and Conclusions of Law dated March 31, 2000, Jerry Fox's testimony was live and recorded in the Transcripts. Tr. 573, 574, 575, 591, 607, 619.

c) Specifically the "core issue," see A 2 raised by the Court of Appeals in the District Court's findings regarding the March 29, 1997 commencement of production are addressed by Jerry Fox testimony. Tr. 607, lines 4-7, Tr. 607, lines 18-21 and 21-23.

III. THE ARGUMENT

A. Under Fed. R. Civ. P. Rule 60(b)(1), the mistakes enumerated in Section II relate to the use of "evidence" not in the record in Judge Bruce B. Black's Amended Findings of Fact and Conclusions of Law dated September 24, 2003.

The use of evidence "not in the record" in paragraphs 23, 31, 34, 44, 48 and 50, taint the entire AFC. The issue of

materiality, credibility and scienter are fact specific inquiries (Exhibit B, page 14). There is no mention of Rendall's, Logwinuk's or Fox's credibility in the record directly or indirectly. The fact specific inquiries of the COA were responded to by Judge Black with non-existent evidence.

a) Paragraph 23 of the Amended Findings of Fact quotes Alex Logwinuk's video testimony (See Fact B of Section II), which quotation cannot be found in the certified transcript (See Fact D of Section II). Exhibit D.

b) Paragraphs 31, 34, 44, 48 and 50. This evidence is non-existent and, in any event, should there have been such a video, it was impermissible as evidence because Dr. Fox was a live witness. (See Facts A, C and D of Section II).

c) The "core issue" of the March 29, 1997 commencement of production, was to have been addressed by Judge Black (Section II A 2). The actual trial testimony of Dr. J. Fox is a rebuttal of the "subsidiary findings" of the District Court (as stated in Section II A 2).

    i) The conclusion that the process works is evidenced by the actual commissioning run witnessed by Dr. Jerry Fox on March 29 and 30. Tr. 607, lines 4-7, wherein samples were taken directly from the log washer and the knock-out drum where the bitumen was stored. Tr. 607, lines 18-21. The results were in the range of 2% solids. Tr. 607, lines 21-23.

ii) The filter was not tested as part of the commissioning. Tr. 590, lines 16-17, J. Fox testimony.

iii) The bitumen product, which Gibson marketed, contained about 4% solids. Fox testimony, Tr. 579, id. Lines 19-20; Tr. 608, Ex. 504, page 4, lines 8-9.

iv) The facts of the March 28 and 29, 1997 first commissioning run bore out Rendall's opinion of February 25, 1997, insofar as "this thing ran immediately" (Fox Tr. 607, lines 407) and produced good oil within a day (Fox Tr. 607, lines 18-23).

v) The specific finding of AFC, paragraph 44 (Section II A) on Ex. 111, App., is rebutted by Exhibit E. The Finding in the AFC is based on non-existent evidence.

The Ex. 111, App. F, attached as Exhibit E (Section II C), was accepted by the trial court. The conclusion of "Solv-Ex personnel" as to the water circulation and clarification is not mentioned or alluded to in the App. F. What was stated in App. F, page 2, about the first commissioning run March 29, 1997 is:

- Total tar sand in = 12 (hours) *75 (tones/hr) = 900 tonnes.
- Bitumen in K.O. (knockout drum) = 2980.02 (ft^3)

62.43 (lbs/fr^3) = 84.41 tonnes.

- J. Fox, Tr. 607, lines 21-23, reported about 2% fines in bitumen in the knock-out drum.
- For purposes of reporting bbls of bitumen produced 7 bbls - 1 tonne (i.e.) about 600 bbls in the KO drum. This is not theoretical, but actual production.

The mistakes in use of evidence not in the record:

a) The use of Jerry Fox's non-existent video testimony to support the AFC in paragraphs 31, 34, 44, 48 and 50.

b) The use of a non-existent quote from Alex Logwinuk's video testimony to support AFC in paragraph 23.

c) The use of non-existent evidence purportedly from Ex. 111, App. F. in support of AFC in paragraph 44, such as "filters were blinded" and the "filtration problem forced a shutdown" requires the case be remanded for a new trial based upon equitable principles of the rule of law requiring evidence based on the record in any order/judgment on the issues.

"Relief provided by the rule governing relief from a judgment or order is equitable in nature and is to be administered upon equitable principles." DeVito v. Fidelity & Deposit Co. of Maryland, C.A. 7th, 1966, 361 F.2d 936.

The Fifth Amendment of the U.S. Constitution guarantees Rendall a right to a "fair trial." It is a "stringent rule" that will bar trial when the appearance of justice is not satisfied as well as (in) instances of actual bias. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

B. Fed. R. Civ. P. Rule 60(b)(2) provides a basis in "newly discovered evidence" which shows that the trial judge was biased in order to remand the case for a new trial.

The AFC provides the "newly discovered evidentiary criteria" to show the bias of the trial judge in the use of non-existent video testimony of Dr. J. Fox, which is elaborated on factually in the previous Section III, and taints the entire AFC.

Rendall respectfully requests that the trial court, Judge Bruce B. Black, remand the case for a new trial with a new judge. This issue was dealt with in Re International Business Machines Corp., 618 F.2d 923, 929 (1980) Second Circuit, quoting:

> "As Mr. Justice Frankfurter noted in Wilkerson v. McCarthy, 36 U.S. 53, 65, 69 S.Ct. 413, 419, 93 L.Ed. 407 (1949) (Frankfurter, J., concurring), "A timid judge, like a biased judge, is intrinsically a lawless judge."

C. Fed. R. Civ. P. Rule 60(b)(4) provides that the court may relief a party from a final judgment or order when the judgment is void.

The "due process of law" requires that the entire case be remanded as to the use of evidence not in the record (see Section III A) taints and voids the entire AFC. As stated in Wright, Miller & Kane Federal Practice and Procedure, Civil 2d, § 2862, p. 326:

> "A judgment is not void merely because it is erroneous. It is void only if the Court that rendered it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with the due process of law." Union Switch & Signal v. Local, 610 C.A. 3d. 1990 900 F.2d 608, 612, quoting Wright, Miller & Kane.

D. Fed. Rules of Civil Procedure and Rules under Title 28 Judiciary and Judicial Procedure, 28 U.S.C. § 144 governs the bias and prejudice of a judge, for which relief is required under Rule 60(b)(6).

1. Affidavits are attached to and made a part of the motion by Rendall based on his belief that bias or prejudice by the trial judge, the Honorable Bruce B. Black, exists and is attached to the motion giving Rendall's reasons.

2. The affidavit is timely as the AFC of the trial judge is dated September 24, 2003, and jurisdiction left the Court of Appeals (denial of Rendall's request for *en banc* reconsideration on June 16, 2004).

3. The use of evidence not in the record in the AFC demonstrates for the first time the bias and prejudice of the trial judge. Rendall is not clairvoyant and this is the first opportunity to file his affidavit.

4. The US Supreme Court rulings of "bias and prejudice" as per 28 U.S.C. § 144 in United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1966), control this case.

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Citation omitted.)."

5. Rendall's affidavit of "bias and prejudice" of the trial judge based on evidence not in the record is not specifically covered by Rule 60(b)(1)(2)(4), although the substance of "mistake" newly discovered evidence and void judgment has been pled. Nevertheless, the motion is timely and justifies relief under Rule 60(b)(6).

6. Subject to the propositions that the finality of judgments is a sound principle that should not be lightly cast aside, that clause (6) is not a substitute for appeal, nor is it ordinarily a vehicle to reopen a judgment to litigate a matter that either was or could have been litigated prior to or on appeal, and should not be employed merely to evade the time restrictions on motions under subdivisions (1), (2) and (3) of the rule, clause (6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief, but the motion is, nevertheless, timely and the reason justifies relief. Moores Federal Practice, 2nd Edition, Vol. 7, 260-294, 295.

WHEREFORE, the Court is respectfully requested to remand the entire case for a new trial, based on mistakes, new

evidence, void judgment, and bias and prejudice arising out of the use of evidence not in the record pled above.

Respectfully submitted

/s/ John S. Rendall
John S. Rendall, Pro Se
2121 Menaul Blvd. NE
Albuquerque, NM 87107
Phone (505) 883-2955
Fax (505) 883-0391

I hereby certify that a true copy of the foregoing pleading was sent first class mail to all parties/counsel of record this /s/ 17 day of August 2004.

/s/ John S. Rendall
John S. Rendall

AFFIDAVIT OF JOHN S. RENDALL AS PER U.S.C. § 144 CLAIMING BIAS AND PREJUDICE OF THE HONORABLE BRUCE B. BLACK IN CIVIL ACTION 98-860 BB/RLP

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

John S. Rendall, first duly sworn upon oath, deposes and states:

1. I am a Defendant pro se in Docket Civil Action 98-0860 BB/RLP.

2. The United States Court of Appeals 10th Circuit declined to hear Rendall's appeal for re-hearing on June 16, 2004. Exhibit A.

3. The "mistake" and "newly discovered evidence" on which John S. Rendall is claiming bias and prejudice of the Honorable Bruce B. Black in this action was sent by the said Judge to the Court of Appeals 10th Circuit (upon their remand) on September 24, 2003.

4. This is the first time Rendall is able to directly file this Affidavit claiming bias and prejudice of Judge Black. It could not have been filed at the hearings or on appeal until after June 16, 2004, when the case left the jurisdiction of the U.S. Court of Appeals 10th Circuit.

5. Attached as Exhibit B to this Affidavit is a true and correct copy of the Court of Appeals Order dated August 4, 2003 in Case 00-2339, for Judge Black to provide specific primary evidence for his Findings of Fact and Conclusions of Law dated March 31, 2000 in CV 98-0860 BB/RLP.

6. Attached as Exhibit C to this Affidavit is a true and correct copy of Judge Black's Amended Findings of Fact and Conclusions of Law dated September 24, 2003, wherein the basis of the primary evidence in:

a) Paragraphs 31, 34, 44, 48 and 50 was the non-existent video testimony of Dr. J. Fox in CV 98-0860 BB/RLP.

b) Paragraph 23 was the non-existent quote from Dr. Alex Logwinuk's transcript of his video testimony, Exhibit D, claiming erroneously that he said unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." On the contrary, he did say in the transcript, page 32, 33, "The type of oils that we utilize in automobiles might have a viscosity of 50 or 60 centistokes. But you always have to specify a temperature with this, because you could take bitumen that has 200,000 centistokes at room temperature and heat it up to 3 or 400 degrees and it will have a viscosity down in the vicinity of 40, 50 or 60."

c) Paragraph 44 was the non-existent quote from Ex. 111, App. F, attached as Exhibit E. During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the log washer train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of fine particle solids, the filters were "blinded" and the log washer had to be shut down after just twelve hours of operation. Ex. 111, App. F; Fox video testimony.

7. Attached as Exhibit H to this Affidavit is a true and correct copy of the Order and Judgment of the Panel of the Appeals Court, Henry, Porfilio and Murphy, Circuit

Judges, filed April 15, 2004, wherein no reference is made to the non-existent video testimony of Dr. J. Fox or of Rendall's claim that the Findings of Fact and Conclusions of Law (Item 4), in its entirety, was tainted.

Further Affiant sayeth not.

/s/ John S. Rendall

Subscribed and sworn to before me this /s/ 13th day of August, 2004 by John S. Rendall.

/s/ Yvette Dow Lopez

My commission expires:
/s/ 7-3-06

FURTHER
AFFIDAVIT OF JOHN S. RENDALL AS PER U.S.C. § 144 CLAIMING BIAS AND PREJUDICE OF THE HONORABLE BRUCE B. BLACK IN CIVIL ACTION 98-860 BB/RLP

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

John S. Rendall, first duly sworn upon oath, deposes and states:

1. I am a Defendant pro se in Docket Civil Action 98-0860 BB/RLP.

2. Shortly after the final Order of Judge Bruce B. Black dated May 16, 2000, Rendall picked up six (6) boxes of the Judge's record of the case from Lincoln Sorrell at his request.

3. The District Court did not have the original exhibits to provide to the 10th Circuit Court of Appeals. See attached Exhibit F, letter from Ted Schweitzer of the Securities and Exchange Commission (SEC) dated March 5, 2001.

4. Rendall filed a motion for the SEC to provide the exhibits to the 10th Circuit Court of Appeals on February 23, 2001. Exhibit G.

5. The 10th Circuit Court of Appeals denied Rendall's motion by Order dated April 15, 2004. Exhibit H.

6. Rendall was informed by Lincoln Sorrell that the 10th Circuit Court of Appeals Order of Remand to Judge

Bruce B. Black dated August 4, 2003 did not need the record as given to Rendall in Item 2 above, but the transcript from the court reporter was sufficient.

7. Neither the District Court, nor Judge Bruce B. Black had the exhibits needed to understand the evidence presented in the trial. (Transcripts as based on the documents used in trial).

8. The Amended Findings of Fact and Conclusions of Law of Judge Bruce B. Black dated September 24, 2003, could not have been based on the documentary evidence presented at trial.

9. The Amended Findings of Fact and Conclusions of Law is not based on the record in this case.

10. The Amended Findings of Fact and Conclusions of Law is based on "evidence not in the record" and demonstrates Rendall's belief of the bias and prejudice of the Judge.

Further Affiant sayeth not.

/s/ John S. Rendall

Subscribed and sworn to before me this /s/ 13th day of August, 2004 by John S. Rendall.

/s/ Yvette Dow Lopez

My commission expires:
/s/ 7-3-06

CERTIFICATE OF MAILING

Pursuant to Federal Rules 60(b)(1)(2)(4)(6) and 28 U.S.C. § 144, I hereby certify that a true and correct copy of this aforementioned "Motion for Retrial" was mailed U.S. Mail (First Class/Priority) to:

Counsel for the Plaintiffs:
Julie K. Lutz, Esq.
Securities and Exchange Commission
1801 California St., Suite 4800
Denver, CO 80202

Ray Hamilton, Esq.
Supervisory Assistant U.S. Attorney
P.O. Box 607
Albuquerque, NM 87103-0607

and

CERTIFICATE OF FILING in the United States District Court for the District of New Mexico and hand delivery of the aforementioned "Motion for Retrial" to Defendant Pro Se Herbert M. Campbell III and Defendant Solv-Ex Corporation, CEO Frank Ciotti, on this /s/ 17 day of August, 2004.

/s/ John S. Rendall
John S. Rendall, Pro Se
2121 Menaul Blvd. NE
Albuquerque, NM 87107
(505) 883-2955
Fax (505) 883-0391

EXHIBIT B-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs. NO. CV 98-0860 BB/RLP

SOLV-EX CORPORATION, ET AL.,
Defendant.

Transcript of Motion Proceedings before The Honorable Bruce D. Black, United States District Judge, Albuquerque, Bernalillo County, New Mexico, commencing on October 29, 2004.

For the Plaintiff: Mr. Edward Schweitzer, Jr.
Via Telephone
For the Defendants: Mr. John Rendall, Pro Se

Jennifer Bean, FAPR, RDR, RMR, CCR
United States Court Reporter
Certified Realtime Reporter
333 Lomas, Northwest
Albuquerque, NM 87102
Phone: (505) 348-2268
Fax: (505) 843-9492

THE COURT: Court will be on the record in the matter of the Securities and Exchange Commission versus Solv-Ex, 98-CV-0860.

Counsel, please enter your appearance for the SEC.

MR SCHWEITZER: This is Edward Schweitzer from Washington, D.C. representing the Securities and Exchange Commission. Good morning, Your Honor.

THE COURT: Good morning, Mr. Schweitzer.

MR. RENDALL: John Rendall, Defendant, pro se.

THE COURT: Mr. Rendall.

Mr. Rendall, I believe you have a motion.

MR. RENDALL: Yes, Your Honor.

THE COURT: You may proceed.

MR. RENDALL: Your Honor, my name is John S. Rendall. I'm a defendant pro se in this motion before this Court. The motion is a 60 (b)(1)((2) (4) (6) motion, which has been brought by Rendall. And after considerable thought and consultation, since I'm a pro se defendant, among many, including professor of constitutional law in the University of New Mexico, who suggested this course of action.

THE COURT: All right. Did he help prepare any of these pleadings?

MR. RENDALL: No, Your Honor.

THE COURT: You may proceed.

MR. RENDALL: This issue, Rule 52 clearly erroneous findings, which can be set aside. But the only course of action to set aside a judgment based on clearly erroneous under rule 59, the time passes.

THE COURT: I'm not sure at this point I have the authority to set them aside. They've been affirmed by the

court of appeals, which I think would make them the law of the case.

MR. RENDALL: I didn't follow, Your Honor.

THE COURT: I say, I believe the court of appeals has affirmed those facts, and that would make them the law of the case. I don't have the authority to overrule the court of appeals in Denver.

MR. RENDALL: The issue for the court of appeals, Your Honor, is the Court accepted the rulings based on procedural matters, and not substantive, and so they cannot be the law of the case. The issue is procedural, not substantive. The court of appeals accepted the Court's version of further factual findings. The procedure is to accept the district court findings of Dr. Jerry Fox's video testimony, as the court of appeals did not have the record of the exhibits and could do not less. If they did, they would have found the absence of the so-called video testimony and reversed the judgment as based on evidence not in the record.

THE COURT: Well, whether they would have or not, I can't overrule that. I don't necessarily agree with that, obviously. But whether or not the court of appeals would have done it, I am not at liberty at this point to change any decision that's been affirmed by the court of appeals.

MR. RENDALL: In the alternative, Your Honor, the court of appeals has no jurisdiction to accept Rendall's affidavit of bias and prejudice in relation to the findings of fact and conclusions of law. Under 28 USC § 144, that could only have been filed in the district court. And the court of appeals had no jurisdiction to accept it. So –

THE COURT: Again, I'm not in a position to judge the actions of the court of appeals. The chain of authority is that they review my work and overrule me. I don't overrule them. Whatever authority they have, I'm not at liberty to

judge it, even if I agreed with your arguments.

MR. RENDALL: Yes, so the filing of the 28 USC § 144, Your Honor, is in the district court and is up for hearing It is not a jurisdictional issue for the court of appeals.

THE COURT: But they, nonetheless, entertained it?

MR. RENDALL: They did not entertain it, Your Honor.

THE COURT: All right. You may proceed.

MR. RENDALL: Right. The case is brought as an enforcement action against Solv-Ex Corporation by the Securties and Exchange Commission against the CO, John Rendall, and senior vice president, Herb Campbell, under Section 10 (b) 13 (a) of the Securities and Exchange Act of 1934. The SEC contends the defendants made false and misleading statements in 1995 through April of '97 to the public that gave the impression that the Solv-Ex technologies being developed were an unqualified success, among other claims. The Court found defendants guilty after an eight-day bench trial, and fined Rendall and Campbell $5,000 each, granting injunctive relief.

Rendall and Campbell, pro se, appealed the findings of fact. When not supported by the record, among other issues raised, the court of appeals remanded the findings of fact by order for further factual findings to be able to make an effective appellate review of most of the issues. As quoted, materiality is a fact-specific inquiry, quoting Basic Inc. v. Levinson, 485 U.S. 224.

Further factual findings were submitted by this Court, which results in the 60(b) motion to reverse the judgment due to mistakes of this Court. Or in the alternative, as we are now coming, to recuse the judge upon Rendall's affidavit, showing the bias and prejudice of the judge, and setting a new trial date. The bias and prejudice is predicated on reaching

findings of fact and conclusions of law based on evidence not in the record; that is, the video testimony of Jerry Fox, and further, the documentary testimony quoted. The facts are, one, the original factual findings on the core issue of bitumen extraction relied on the trial testimony of Dr. Jerry Fox, paragraphs 24, 32, 46, 50, and 51. Further factual findings of this Court and response to the court of appeals' order on the core issue of bitumen extraction replaced the trial testimony of Dr. Jerry Fox wherever it occurred with Dr. Jerry Fox's video testimony, in paragraphs 31, 34, 44, 48, and 50 of the amended findings of fact.

The issue dispositive of this action is Dr. Jerry Fox's video testimony is nonexistent. Not only that, but Dr. Fox was a live witness. The court of appeals' rulings are procedural on this issue, and not substantive, and so cannot be the law of the case. Because the CO accepted the Court's version, as I stated earlier, and –

THE COURT: So is it your basic position Dr. Fox didn't say these things, or that it's misattributed to his video testimony rather than live testimony?

MR. RENDALL: Originally, it was attributed to his live testimony, and the transcript was quoted in various paragraphs. The court of appeals reviewed it and found that the transcript did not support the facts.

THE COURT: Where did they find that?

MR. RENDALL: In their--I'm reading now from Exhibit B, Your Honor, which is the order of the court of appeals, and the order of the court of appeals was filed on August the 4, 2003.

THE COURT: What page are you referring to?

MR. RENDALL: Page 9 – page 8. "Here, although the district court" – at the end of that page – "Here, although the district court made lengthy findings of fact, there are some

important gaps that preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to he district court for further factual findings and explications of its reasons."

THE COURT: How does that show that Dr. Fox didn't state the testimony quoted?

MR. RENDALL: The original findings of fact included transcript testimony of Dr. Jerry Fox.

THE COURT: I understand that. What I want to know is, are you claiming Dr. Fox didn't state that, or are you claiming that it's miscited as video as opposed to transcript of live testimony?

MR. RENDALL: What I'm stating is that the original findings of fact, which contained the transcript, were sent back to the district court.

THE COURT: Yes sir, for additional findings.

MR. RENDALL: And now replaced in full. So I have no legal standing. So the transcript, Your Honor, has no legal standing now in this Court, because it has been replaced by the amended findings.

THE COURT: All right. Well, I don't agree with that. I don't think there is any legal basis for that conclusion.

MR. RENDALL: Well, I haven't got the letter with me, but the amended findings were said by the court of appeals to be replaced in total, the original findings of fact. And so as far as I can make out from the court of appeals' rulings that they considered that the original findings of fact are not to be replaced entirely by the amended findings.

THE COURT: And, therefore, because the amended findings cite video, as opposed to transcript references, the court of appeals cannot rely on any testimony of Dr. Fox, is that your basis position?

MR. RENDALL: My position is that the court of appeals could not have in any way done anything but accept your version, Your Honor, that Dr. Jerry Fox's video testimony supported your facts. And that they had no basis to change it. They have no transcript evidence to change it. Dr. Fox's video testimony was not in the record, and they didn't have the record. And so there is no way the court of appeals, in all conscience, could have examined the findings of fact based on the video testimony, which was nonexistent. They read the original transcript; found it defective. That's why they sent it back.

THE COURT: Where does it say that? You're relying on these two sentences to say the original transcript is defective?

MR. RENDALL: No, what I'm relying on is their sending it back.

THE COURT: It doesn't say anything that the transcript lacks evidence; it's because the findings aren't specific and extensive enough.

MR. RENDALL: Well, may I particularly refer to the page, Your Honor?

THE COURT: Yes, sir. Please do.

MR. RENDALL: Can I have a drink of water?

THE COURT: Yes, sir.

MR. RENDALL: Page 13, Your Honor.

THE COURT: Yes, sir.

MR. RENDALL: "For instance, with regard to defendants' representations that commercial-scale production of bitumen had begun, the district court made the following subsidiary findings: The March 29 run of the logwasher circuit had not been completed.

2. The Solv-Ex personnel determined that certain things were needed.

3. The logwasher had to be shut down after 12 hours due to an unexpected buildup of solids in the pump box.

Solv-Ex was not able to filter bitumen until April 21.

5. Solv-Ex was not able to duplicate the production of filtered bitumen. In fact, after the logwasher was shut down, it was not operated except for demonstration runs of more than six hours.

Solv-Ex was never able to sustain continuous operation of logwasher at the Alberta plant.

"If we compare these subsidiary findings to defendants' relevant public statements of March 31, April 7, and April 30, we can determine which facts were omitted from those public statements. But we cannot determine which of the omitted facts the district court found to be material. Materiality is a 'fact-specific inquiry' that depends on the significance the reasonable investor would place on" it. "Findings as to materiality are for the district court to make it the first instance.

"We face the same problem with regard to the other two representations." If we could determine what facts recited by the district court are missing" -- we cannot determine that -- "The Court found to be material." So, "On remand, the district court should make additional findings as to what was false and misleading about the relevant statements" and "what material facts were omitted, if any."

In other words, they found issues missing. That is, what are these statements, and what statements were attributed to me?

THE COURT: No, which were material and misleading.

MR. RENDALL: Yes.

THE COURT: All right. What does any of that got to do with Dr. Fox's testimony being in either transcript or video form?

MR. RENDALL: I'm coming to that, Your Honor.

THE COURT: All right.

MR. RENDALL: So all of this is Dr. Jerry Fox's testimony, all these issues.

THE COURT: Well, not exclusively.

MR. RENDALL: Well, if you take the amended findings by Rule 44, Your Honor, it will show that all these issues were in relation to an exhibit you quoted, which was Exhibit 111, Appendix F. And that exhibit has been included here. That exhibit does not substantiate in any way; the issue of filtration is not even mentioned in the exhibit, and yet, it's been put in to support these statements. The document itself does not support these statements. So that's number one.

Number two, Jerry Fox's video testimony was in relation to that document. So the transcript could not have supported that testimony, because the document on which the transcript is based is minus this testimony. So on the face of it, Your Honor, this document doesn't support the testimony -- doesn't support the finding. The transcript was live testimony of Dr. Jerry Fox on Exhibit 111, Appendix F, which doesn't contain any of this, especially on filtration.

So my position, Your Honor, or Rendall's position, is that the finding of fact is clearly erroneous because it was not based on the document; it was not touched on by the court of appeals; and based on video testimony which the court of appeals had no access except to accept your version, Your Honor, that it was there. They had no way to disagree with you, Your Honor, because they didn't have the record, they

didn't have the exhibit.

And so, therefore -- I use this word therefore, as I'm an engineer, and we use the word therefore, and I've been corrected several times. Because the testimony of Dr. Jerry Fox, relating to the video, does not substantiate anything about these findings in relation to statements that Solv-Ex made or Rendall made or Campbell made. And I believe that's the substantive issue, not the procedural issue in this case. A mistake has occurred, Your Honor.

The bottom line is that a mistake has occurred, and it's clearly erroneous. Where do we get remedy for it? It's newly discovered. It could not have been discovered from the court of appeals law of the case, because they did not have the record. The only way open and in good conscience is in a 60 (b) motion, when newly discovered evidence, which could not have been possibly before the court of appeals -- could not have been, they didn't have the record, could only be presented in this Court. And so 60 (b) is a provision by the Court in relation to newly discovered evidence. This newly discovered evidence, Your Honor, is outside the realm of the court of appeals. They did not have it, so they could not rule on it.

So I believe the clearly erroneous standing of newly discovered evidence under Rule 60 (b) (1), and the mistake under 2 -- and if we read the rule, Your Honor, newly discovered evidence, which by due diligence could not be -- newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial. It could not have been presented to the court of appeals. The court of appeals has no jurisdiction over evidence which it didn't have. This Court has the evidence. This Court has the jurisdiction.

So I would submit, Your Honor, that the law of the case is evidence which the court of appeals did not have; it's newly discovered; it's a mistake; it's clearly erroneous; and it substitutes evidence of the original findings. And it discloses -

- not only that, Your Honor, that the fact occurred that every way in five paragraphs -- it's not just a mistake -- in five paragraphs -- not just one instance, five -- the best trial testimony has been replaced by the video testimony.

There is no basis on which the court of appeals could rightly look at the evidence except by accepting Your Honor's version.

And now I'm presenting the evidence, Your Honor, which the court of appeals did not have, that this was not only a mistake, it was nonexistent evidence. No Court of law, Your Honor, can nonexistent evidence be used to justify findings of fact. It's outside the record.

And if you look at my affidavit, Your Honor, which is attached to the motion, the primary evidence is these paragraphs of the nonexistent video testimony of Dr. Jerry Fox, 31, 34, 44, 48, and 50. Paragraph 23 was the nonexistent quote from Dr. Alex Logwinuk, and I've attached --

THE COURT: What do you mean by a nonexistent quote? I just made that up, or it wasn't sent to Denver with the record? What's your point exactly?

MR. RENDALL: I don't know where Your Honor got it from, but it wasn't in the transcript. Now, what was in the transcript -- the position of reading of the findings -- the original findings of fact, Your Honor, and the amended findings of fact is a concentration of issues which have no evidence in the record to back them up. The filtration of bitumen, he said, if you look at the transcript, could occur if the bitumen was heated. Instead, something was used to show it cannot be done. That's not in the evidence.

Paragraph 44, which is appendix -- which is Exhibit 111, Appendix F, is attached as Exhibit E, which goes to the crux of this issue. This plant was running on March the 29th,

and the conclusion of this Court in the findings of fact was that this was more or less a dream. It wasn't a dream. It was a real plant. It was 60 foot high, Your Honor. And that's all in the transcript testimony. It produced oil. Not filtered bitumen. Filtered bitumen is not in the exhibit.

And what was said here in paragraph 44 is a component -- "due to buildup of fine particle solids, the filters were blinded." There is no such thing. No such thing in the document, no such thing in the transcript. The only place where it can be justified is the video testimony of Dr. Jerry Fox, and it's nonexistent.

So based on the evidence not in the record, based on a crucial issue, which is the primary issue in this case, extraction of bitumen, Your Honor, I would submit that I have a factual basis. Not a frivolous basis, Your Honor. I'm not here frivolous. I'm here after a lot of consideration, and in good conscience, that Your Honor was biased and prejudiced.

To change -- if we changed places, Your Honor, you would have told me I was fabricating evidence. If I changed it and did it, you would have called it fabrication.

It is a serious issue, Your Honor, to reach findings of fact which destroy -- well, this is not necessarily anything but rhetoric -- destroy a company and its CEO, based on evidence not in the record. And I have a reason in my affidavit of a belief that Your Honor is biased and prejudiced. And I could not have filed this before now. It was in the court of appeals. And I believe the court of appeals did not have this evidence; it's newly discovered; it's a mistake. And I have filed an affidavit of your disqualification, Your Honor, from any further opinion in this case.

THE COURT: That will be denied.

Mr. Schweitzer?

THE COURT: I say I denied the motion to disqualify

for bias and prejudice. If anything, Mr. Rendall, I was biased in favor of you and Mr. Campbell, and I tried to soft pedal my findings, and obviously, did too good a job of that, and that's why the court of appeals remanded it, so I could find exactly what was material in your misstatements, which I did in my amended findings. So I'll deny the bias and prejudice motion to recuse.

You may proceed, Mr. Schwetizer, to answer Mr. Rendall's other allegations and arguments.

MR. SCHWEITZER: Your Honor, the SEC believes that MR. RENDALL. Rendall's arguments are completely frivolous and have no legal basis whatsoever. This is not a matter of fabricated evidence. It's a matter of a very small number of incorrect citations in an extremely complicated case involving conflicting testimony and a great number of exhibits.

It was Mr. Rendall's obligation as appellant to bring before the Tenth Circuit whatever exhibits he thought were relevant and demonstrated error on the part of this Court. He did not do that except on a very incidental basis. The SEC submitted an extended appendix of about 300-some pages of exhibits. Mr. Rendall and Mr. Campbell submitted a few additional exhibits. They did that in every brief they filed.

Every matter that Mr. Rendall has raised today with this Court he raised with the court of appeals except for the bias argument under 144, which is completely spurious, because there is no basis outside the court proceedings for any of the mistakes or supposed evidences of bias that he points to. It's all based on a proceedings. A likely decision by the Supreme Court makes clear that that is not bias in the sense that requires the judge to recuse himself.

Mr. Rendall claims that he had no evidence -- he had no opportunity to make his argument on the mistakes in the amended findings of fact to the Tenth Circuit. That's completely false. He made those arguments twice. He made

them first in the supplemental briefing based on your amended findings of fact and conclusions of law, and he made them a second time in his petition in his petition for rehearing. That was denied. The Tenth Circuit recognized that the mistakes were of no account, and that clearly is the reason that they were ignored. But his arguments were made. He had the opportunity to make them, and he seized the opportunity to do so.

The decision of the Tenth Circuit is the law of the case, and as noted in our briefing, his petition for rehearing and his 60 (b) motion correspond almost point for point. All the arguments were made. They were rejected. That's the end of the story. But even if it were newly discovered evidence, as it is not, we're dealing simply with citations. We're not dealing with evidence. And he had made absolutely no attempt to show, as he is required to, that the mistakes are material; no effort to show that they are more than cumulative or impeaching; and no evidence effort to show that a new trial would reach a different result.

The one point he is focusing on today is the reference to the filters in the first test of the equipment at the plant. That's a mistake that is entirely understandable, given the technical complexity of the case. That was argued in the very first round briefing. It was argued again in the supplemental rounds of briefing. It was addressed by the Tenth Circuit. They had the evidence that Mr. Rendall wanted to present, and it affirmed your decision for the reasons set out in your decision. And that's the end of the story.

THE COURT: Anything else, Mr. Rendall?

MR. RENDALL: Yes, Your Honor. I'd like to respectfully disagree with learned counsel, Mr. Schweitzer, on the record. Rendall is pro se in this case. The court of appeals asked the Court by letter to supply the complete record. The court of appeals -- the district court here, and I've

got it in my affidavit --

THE COURT: Under our local rule, you are responsible for providing the record, not the district court. If you have failed to honor that obligation, Mr. Rendall, I don't believe you can change the burden.

MR. RENDALL: Under the rules, if I'm a pro se --

THE COURT: Well, that does not relieve you of your obligations to fulfill the rules of appellate procedures or the rules of this Court.

MR. RENDALL: The only way I could fulfill that obligation, Your Honor -- because I'm pro se I'm not an officer of the Court, and documents in my possession are, therefore, not protected documents under the rules. Documents of the district court, who should have kept the entire record --

THE COURT: That is not correct under our local rule. But go ahead. You are responsible for keeping the exhibits and forwarding them to the court of appeals; not this Court.

MR. RENDALL: Well, the letter was sent to --

THE COURT: Only because you didn't fulfill your obligation.

MR. RENDALL: Before that, Your Honor. Initially, the whole procedure started by the court of appeals asking the district court for the whole record, including the exhibits. The district court did not have it; then called me whether I could supply it. They asked me. I didn't ask them. So in response to the court of appeals --

THE COURT: That's the way we do it in every case.

MR. RENDALL: They asked me -- yes, Your Honor. So they asked me for the record. I said "I'm quite happy to

provide it, but just remember I am pro se. I'm not an officer of the Court. And it's an important issue on the sanctity of the evidence and the exhibits that they are protected from any tampering."

So I called the SEC and said, "Since I'm not an officer of the Court, could you provide it, or would the Court allow me to send the exhibits pro se, which I'm quite happy to do."

They said no, the SEC said no.

I asked the – or filed a motion with the court of appeals – it's a motion – that the record be supplied in full. And as a pro se, although I'm prepared to do it, an officer of the Court needs to do it. The SEC opposed the motion. And in the final order the court of appeals denied the motion. That motion was denied on the final order. It wasn't denied earlier.

So the issue was well and truly looked at as to the record. I was prepared. I had the exhibits. I offered to give it to them. The court of appeals said – not the court, the district court said, an officer of the Court. I filed a motion with the court of appeals that the SEC provide the exhibits. The SEC filed a response saying that they didn't want to do it. And the court of appeals didn't rule on that issue till the very end, when they denied my motion.

So the issue of whether I'm responsible for the record or not is well and truly briefed, Your Honor. If I'm responsible, I was prepared to do it. I'm a pro se person. I offered to do it. But I'm not an officer of the Court. And to preserve the sanctity of evidence, it is necessary that an officer of the Court holds the records. I didn't have it. It is no fault of mine, Your Honor.

THE COURT: So your basic argument boils down to you did not forward the Fox video testimony and, therefore, the court of appeals couldn't rely on it ,is that it?

MR. RENDALL: There was no responsibility to transmit, Your Honor. The video testimony is nonexistent. In any case, Jerry Fox is a live witness. How could we possibly make a video testimony in a court of law as evidence, when the man is there as a live witness? There is no possibility of -- even if there was one -- of it being introduced as evidence. It cannot be under the rules of evidence.

THE COURT: Really? What rule would that be?

MR. RENDALL: Rule 80, Your Honor.

THE COURT: Rule 80?

MR. RENDALL: I'm not sure. I'm going by memory. I'm not a trial lawyer, I'm a pro se person, and I read -- Rule 800, is it? Evidence is on rule -- haven't read the specific one, but it's I think in the rules that evidence in a court of law is -- if live testimony is given, the video testimony cannot be used as evidence. It can be used as evidence in trial; that is, in rebuttal of anything the live witness said. But to place the whole issue on video testimony, which in the first place, even if there was one -- and there wasn't one, and Your Honor knows that. It's not something I'm mentioning to Your Honor which requires an evidentiary hearing, whether there was a video testimony of Dr. Jerry Fox. Everybody knows it. Dr. Schweitzer knows it. Your Honor knows it. And all the defendants know it. So I don't believe that's an evidentiary issue anyway. It's evidence not in the record. And it's clearly erroneous. And the document is clearly erroneous.

So to put the onus on me on the record of appeal, I would state on the record that I did endeavor to do it. I filed a motion so that I could do it. It was denied at the very end. So there was no way I could have done it. To say that these mistakes were of no account at the court of appeals, that's not correct either. They had no basis to show they were not of no account. They did not have the record. In fact, this Court did not have the record; they gave it back to me.

So in doing the amended findings of fact, the record was not available to the court of appeals, not available to this Court to check citations on evidence, materiality, to impeach findings of fact. If there are findings of fact, as there are, and the basis to support those findings of fact are citations of evidence not in the record, it is material. To say the citations are immaterial is not correct. If you put findings of fact, and you cite sources for -- of evidence to support those findings of fact, and those citations are not in the record, then the evidence is not on the record.

As to filtration, it's fundamental, Your Honor. Your Honor, as you can go through these findings, will find that filtration has been the hook on which the SEC hung their case. Filtration wasn't an issue on March the 29th.

Thank you, Your Honor.

THE COURT: I view your argument, Mr. Rendall, largely as non sequitur. It will be denied.

Mr. Schweitzer, if you'll prepare the order. Anything further on behalf of the SEC?

MR. SCHWEITZER: Nothing, Your Honor.

THE COURT: Anything further on behalf of Mr. Rendall, pro se?

MR. RENDALL: No, Your Honor.

THE COURT: Court will be in recess.

(The Court stood in recess.)

C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA
DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, DRR, RMR, CCR, Official Court Reporter for the State of New Mexico, do hereby certify that the foregoing pages constitute a true transcript of proceedings had before the said Court, held in the District of New Mexico, in the matter therein stated.

In testimony whereof, I have hereunto set my hand on November 3, 2004.

Jennifer Bean, FAPR, RMR-RDR-CCR
Certified Realtime Reporter
United States Court Reporter
NM CCR #94
333 Lomas, Northwest
Albuquerque, New Mexico 87102
Phone: (505) 348-2268
Fax: (505) 843-9492

AFFIDVIT OF JOHN S. RENDALL AS PER U.S.C. § 144 CLAIMING BIAS AND PREJUDICE OF THE HONORABLE BRUCE B. BLACK IN CIVIL ACTION 98-860 BB/RLP

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

John S. Rendall, first duly sworn upon oath, deposes and states:

1. I am a Defendant pro se in Docket Civil Action 98-0860 BB/RLP.

2. The United States Court of Appeals 10th Circuit declined to hear Rendall's appeal for re-hearing on June 16, 2004. Exhibit A.

3. The "mistake" and "newly discovered evidence" on which John S. Rendall is claiming bias and prejudice of the Honorable Bruce B. Black in this action was sent by said Judge to the Court of Appeals 10th Circuit (upon their remand) on September 24, 2003.

4. This is the first time Rendall is able to directly file this Affidavit claiming bias and prejudice of Judge Black. It could not have been filed at the hearings or on appeal until after June 16, 2004 when the case left the jurisdiction of the U.S. Court of Appeals 10th Circuit.

5. Attached as Exhibit B to this Affidavit is a true and correct copy of the Court of Appeals Order dated August 4, 2003 in Case 00-2339, for Judge Black to provide specific primary evidence for his Findings of Fact and Conclusions of Law dated March 31, 2000 in CV 98-0860

BB/RLP.

6. Attached as Exhibit C to this Affidavit is a true and correct copy of Judge Black's Amended Findings of Fact and Conclusions of Law dated September 24, 2003, wherein the basis of the primary evidence in:

a) Paragraphs 31, 34, 44, 48, and 50 was the non-existent video testimony of Dr. J. Fox in CV 98-0860 BB/RLP.

b) Paragraph 23 was the non-existent quote from Dr. Alex Logwinuk's transcript of his video testimony, Exhibit D, claiming erroneously that he said unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." On the contrary, he did say in the transcript, page 32, 33, "The type of oils that we utilize in automobiles might have a viscosity of 50 or 60 centistokes. But you always have to specify a temperature with this, because you could take bitumen that has 200,000 centistokes at room temperature and heat it up 3 or 400 degrees and it will have a viscosity down in the vicinity of 40, 50 or 60."

c) Paragraph 44 was the non-existent quote from Ex. 111, App. F, attached as Exhibit E. During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the log washer train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of fine particle solids, the filters were "blinded" and the log washer had to be shut down after just twelve hours of operation. Ex. 111, App. F; Fox video testimony.

7. Attached as Exhibit H to this Affidavit is a true and correct copy of the Order and Judgment of the Panel

of the Appeals Court, Henry, Porfilio and Murphy, Circuit Judges, filed April 15, 2004, wherein no reference is made to the non-existent video testimony of Dr. J. Fox or of Rendall's claim that the Findings of Fact and Conclusions of Law (Item 4), in its entirety, was tainted.

Further Affiant sayeth not.

/s/ John S. Rendall
John S. Rendall

Subscribed and sworn to before me this /s/ 13th day of August, 2004 by John S. Rendall.

/s/ Yvette Dow Lopez
Notary Public

My commission expires:
/s/ 7-3-06

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

vs.

Civil No. 98-0860 BB/RLP
(Filed November 15, 2004)

SOLV-EX CORPORATION
JOHN S. RENDALL and
HERBERT M. CAMPBELL,
Defendants.

AFFIDAVIT OF CORRECTIONS OF JOHN S. RENDALL

in

Transcript of Motion Proceedings before the
Honorable Bruce D. Black, United States District Judge,
Albuquerque, Bernalillo County, New Mexico,
commencing on October 29, 2004.

For the Plaintiff: Mr. Edward Schweitzer, Jr., via telephone;
For the Defendants: Mr. John Rendall, Pro Se
(Transcript filed by Bean & Associates, Inc.)

The Deponent wishes to make the following changes in the testimony as originally given:

PAGE	LINE	SHOULD READ	REASON
7	5	Court of Appeals CO	It should instead of have been COA

8	20	'it has' not 'I have'	The following sentence explains
12	18	'in paragraph 44' not by Rule 44	--
15	15	'Fox' not 'best'	--
18	5	'for a' not 'of a'	--

I, John S. Rendall, do hereby certify that I have read the transcript of motion proceedings before the Honorable Bruce D. Black, United States District Court Judge, Albuquerque, Bernalillo County, New Mexico, commencing on October 29, 2004, and the same and this correction sheet constitutes a true and complete record of my testimony.

Signature of Deponent: /s/ John Rendall
John S. Rendall

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

SUBSCRIBED and SWORN TO before me this 15th day of November, 2004 by John S. Rendall, Deponent.

/s/ Yvette Dow Lopez
Notary Public

My Commission Expires:
/s/ 7-3-06 (Notary Seal affixed)

I hereby certify that a true and correct copy of the foregoing pleading was sent first class mail to all parties/counsel of record this /s/ 15 day of November, 2004.

/s/ John Rendall
John S. Rendall

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff,

vs.

Civil No. 98-0860 BB/RLP
(Filed November 2, 2004)

SOLV-EX CORPORATION
JOHN S. RENDALL and
HERBERT M. CAMPBELL,
Defendants.

ORDER

Upon consideration of defendant John S. Rendall's motions for retrial under Federal Rule of Civil Procedure 60(b) and to disqualify the trial judge for bias and prejudice under 28 U.S.C. § 144, and attached exhibits; the Securities and Exchange Commission's opposition thereto and attached exhibits; Rendall's reply; the order and judgment of the United States Circuit Court of Appeals for the Tenth Circuit affirming this Court's judgment for substantially the reasons set forth in this Court's amended findings of fact and conclusions of; the order of the United States Circuit Court of Appeals for the Tenth Circuit denying Rendall's petition for rehearing and petition for rehearing en banc; and the arguments of Rendall and counsel for the Securities and Exchange Commission before this Court, it is, this 29th day of October 2004,

ORDERED that Rendall's motion for retrial under Federal Rule of Civil Procedure 60(b) is DENIED;

and it is further

ORDERED that Rendall's motion to disqualify under 28 U.S.C. § 144 is DENIED.

/s/ Bruce D. Black
Bruce D. Black
United States District Judge

EXHIBIT B 3

CASE NO. 05-2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF-APPELLEES,

v.

SOLV-EX CORPORATION,
JOHN S. RENDALL, and
HERBERT M. CAMPBELL,

DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court for the District of New Mexico
Honorable Bruce B. Black

Docket No. Civil Action No. 98-860 BB/RLP

APPELLANT'S BRIEF

FILED BY JOHN S. RENDALL, DEFENDANT-APPELLANT

Oral Argument Not Requested

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II. TABLE OF AUTHORITIES

A. Cases cited:

Berger , et al., v. United States
225 U.S. 22 (1921) .....

In Re Murchison,
349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed 942 (1955).....

Re International Business Machines Corp.,
618 F.2d 923, 929 (1980) Second Circuit .....

United States v. Grinnell Corp.,
384 U.S. 563, 583, 86 S.Ct. 1698,
16 L.Ed 2d 778 (1996) .....

B. Other Authorities:
Federal Rules of Civil Procedure:

Rule 52(a) .....
Rule 54(b) .....
Rule 60(b)(1)(2)(4)(6) .....

Securities and Exchange Act of 1934:

15 U.S.C. § 78:
Section 10(b) .....
Section 13(a) .....
Section 17(a) .....
Section 20(b) .....
Section 22(a) .....
Section 27 .....

28 U.S.C. § 144 .....

28 U.S.C. § 1291 .....

III. JURISDICTIONAL STATEMENT

1. The Securities and Exchange Commission brought this action pursuant to authority conferred on it by Section 20 (b) of the Securities Act [15 U.S.C. §§ 78u(e)] to restrain and enjoin the defendants from engaging in the acts, practices and courses of business described in this Complaint, and acts, practices and courses of business of similar purport and object. The Commission also sought relief in the form of an order requiring defendants Rendall and Campbell to pay

civil penalty.

2. This Court has jurisdiction in this action pursuant to Section 22(A) of the Securities and Exchange Act [15 U.S.C. §§ 77v(a)], and Section 27 of the Securities and Exchange Act [15 U.S.C. § 78aa].

Certain of the acts, practices and courses of business constituting the violations of law alleged occurred, and all of the defendants reside, within the District of New Mexico.

3. This matter is before the Court on Appellant Rendall's motion for retrial based on Federal Rules 60 (b)(1)(2)(4)(6) and 28 U.S.C. § 144, which was denied during oral argument, and it was so ordered by Judge Bruce B. Black on November 2, 2004, which order was appealed on January 3, 2005, with docketing statement filed on January 12, 2004. On January 10, 2005, the Clerk of the Court gave Rendall forty (40) days to file his brief.

4. Pursuant to 28 U.S.C. § 1291 (1988 and Supp. 1992) and Civil Docket No. 98-860 BB/RLP, the order denying Rendall's motion for retrial and disqualification of the trial judge under 28 U.S.C. § 144, was denied. This is a final order of the trial court, which disposes of all claims by and against all parties as per Fed. R. Civ. P. 54 (b).

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the repeated use of "evidence not in the record" by Judge Bruce B. Black in the Amended Findings of Fact and Conclusions of Law" dated September 4, 2003, constituted bias and prejudice of the Judge, which prohibited any further opinion of the Judge in this matter under Rule 28

U.S.C. § 144, as ruled by the U.S. Supreme Court in United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1996), and held that:

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Citation omitted)."

2. Whether another judge must be assigned to hear Rendall's motions for retrial under Federal Rule 60 (b)(1)(2)(4)(6), according to 28 U.S.C. § 144. The Fifth Amendment of the U.S. Constitution guarantees Rendall a right to a "fair trial." It is a "stringent rule: and will bar trial when the appearance of justice is not satisfied, as well as (in) instances of actual bias. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed 942 (1955).

V. BRIEF DESCRIPTION OF THE NATURE OF THE ACTION AND THE RESULT

1. The nature of the action.

The Securites and Exchange Commission (SEC) brought this enforcement action against defendant Solv-Ex Corporation, its CEO John Rendall, and its senior vice president and general counsel, § 10 (b) and § 13(a) of the Securities and Exchange Act of 1934 (Exchange Act), and the rules promulgated under those Acts. The SEC contended that, from January 1995 through April 1997, defendants issued a series of public statements in press releases, letters to shareholders, conference calls with investors and brokers, and filings with the SEC, that created the misleading impression that each of the three technologies being developed by Solv-Ex was an unqualified success. The SEC asserted that "[t]he

pattern of these statements created in the mind of any reasonable investor the expectation that commercial exploitation of the technologies, each with an attendant substantial revenue stream, was not only assured, but would occur in the very near future." R. Vol. IV, Doc 90 at 1.

2. The result.

After an eight-day trial to the bench, the district court issued a lengthy written decision finding that defendants Rendall and Campbell had made material misrepresentations and/or omissions in public statements and in filings with the SEC. The court imposed first tier civil penalties of $5,000 against each and permanently enjoined both men from future violations of § 17 (a), § 10(b), and § 13 (a).

3. Rendall appealed to the Tenth Circuit Court of Appeals (COA), Case 00-2339.

i) COA order and judgment dated August 4, 2003, Docket 1512, Vol. V, remanded the lower court's "Findings of Fact and Conclusiosn of Law" dated March 31, 2000, Docket 120, back to the trial court with comments as follows:

Id at 2. "Because the district court's decision does not contain key factual findings that are essential to effective appellate review, we must make a limited remand to the district court to supplement its factual findings."

Id at 8. "*Requirements of Fed. R. Civ. P. Rule 52(a).* Here, although the district court made lengthy findings of fact, there are some important gaps that preclude effective appellate review of most of the issues raised on appeal. Therefore, we must make a limited remand to the district court for further factual findings and explications

of its reasoning, as we explain below."

Id at 12.

"2. *What was false about the statement and/or what material facts were omitted that should have been included to make the statement not misleading?*

The district court's ultimate findings of material misrepresentation also do not identify exactly what was false or misleading about defendants' statements, including what material facts should have been disclosed to make the statements not misleading. While the district court's subsidiary findings include numerous facts that our review shows were not revealed in Defendants' public statements, the court made no findings as to which of those omitted facts were material." Id at 25.

"*Conclusion*

The remaining issues that Rendall and Campbell raise on appeal are affected by our need for additional findings from the district court. Therefore, we will not address them at this time. Instead, we will remand to the district court for the limited purpose of making additional findings of fact and conclusions of law where necessary, in accordance with our discussion above and with the following directive."

ii) The District Court submitted its Amended Findings of Fact and Conclusions of Law dated September 24, 2003 (Docket 152, Vol. V)

iii) The defendant/appellees Rendall and Butler filed supplemental briefs and replies to the SEC's response in the time set by the COA.

iv) The COA affirmed the judgment of the District Court on April 15, 2004. (Docket 153, Vol. V).

> *Id* at 5. "We therefore AFFIRM the judgment of the district court for substantially the reasons set forth in its detailed and comprehensive amended findings of fact and conclusions of law issued September 24, 2003.[102] Rendall's motion to reconsider our decision not to hear oral argument in this appeal is DENIED. Rendall's motion to require the SEC to file all the trial exhibits of record is DENIED;[103] his amended motion is GRANTED to the extent that it seeks permission to file Exhibit Nos. 20, 25, 885, 886, 887, and 1103 as an additional addendum to his brief."

4. Appellant Rendall filed on May 28, 2004 a Petition for a Panel Rehearing with Suggestion for a Hearing en banc of the order and judgment of Henry, Porfilio and Murphy, Circuit Judges, dated April 15, 2004. Rendall also filed with the COA an affidavit[104] under 28 U.S.C. § 144 as Exhibit G, stating that Judge Black demonstrated bias and prejudice in his opinion as based on evidence not in the record (non-existent video testimony of Dr. J. Fox) and is disqualified

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[102] The underlining is by appellant to emphasize the COA decision as based on the Amended Findings of Fact issued September 24, 2003.

[103] The underlining is by appellant to emphasize that the COA did not have all the trial exhibits of record.

[104] This affidavit was to have been field with the trial judge. The COA had no jurisdiction to rule on it. Further, the COA did not have the complete record of the Exhibits used at trial and had no basis to rule on the non-existent video testimony of Dr. J. Fox. This affidavit was not part of the Docket in 98-CV 860, as it was not filed (as required by 28 U.S.C. § 144) in the U.S. District Court of New Mexico.

by 28 U.S.C. § 144 from this case. The US Supreme Court rulings of "bias and prejudice" as per 28 U.S.C. § 144 in United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed 2d 778 (1966) control this case.

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Citation omitted)."

The result of the judges disqualification is such that in fairness and in protection of Rendall's constitutional rights to due process and equity, the order of the District Court enjoining Rendall from future violations of the Securities laws and imposing a $5,000 penalty must be set aside.

3. This affidavit under Rule 28 U.S.C. § 144 was to have been filed with the trial judge. The COA had no jurisdiction to rule on it. Further, the COA did not have the complete record of the exhibits used at trial and had no basis to rule on the non-existent video testimony of Dr. J. Fox. This affidavit is not part of the docket in 98 CV 860, as it was not filed (as required by 28 U.S.C. § 144) in the U.S. District Court of New Mexico.

5. On June 16, 2004, the COA ordered denial of Rendall's petition for re-hearing. The en banc suggestion was also denied.

6. On August 17, 2004, Appellant Rendall filed a motion with the N.M. District Court (trial judge, Bruce B. Black) for retrial based on Federal Rules 60 (b)(1)(2)(4)(6) and 28 U.S.C. § 144. (Docket 155 in Vol. V of the record on appeal).

7. Rendall's affidavit under 28 U.S.C. § 144 is attached as Exhibit A. This affidavit is the subject of the issues raised on appeal.

8. After oral argument on October 29, 2004 (Vol. VI of the record on appeal), the trial judge on November 2, 2004 ordered that Rendall's motion for retrial under Federal Rule of Civil Procedure 60(b) was denied and further ordered that Rendall's motion to disqualify under 28 U.S.C. § 144 was denied as well. (Docket No. 164 in Vol. V of the record on appeal).

VI. STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

A. The only primary document relevant to the issues submitted for review is the trial court's Amended Findings of Fact and Conclusions of Law dated September 24, 2003, Docket 152, Vol. V, wherein the following paragraphs were based on "Evidence not in the record":

1. Paragraph 23: (Pages 8-9)

At about this time, Solv-Ex realized they could not afford a visbreaker, so they decided to try to filter the bitumen to produce a much more coarser product. Unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." **Logwinuk video testimony**.

2. Paragraph 31: (Page 11)

When it was clear the 44-inch production scale filter could not be designed and constructed in time to meet the widely publicized production schedule, Mr. Rendall directed

Solv-Ex personnel to order a prototype 24-inch diameter Mott filter in November 1996. **Fox video testimony**.

3. Paragraph 34: (Pages 12-13)

During the December 3, 1996 conference call, Mr. Rendall also stated that, "we have a $13 million contingency to keep to our original oil production schedule." He further stated, "...please remember that the successful operation of our plant in the first quarter is planned to bring a revenue stream of $1 million per month, rising to $4 million by the third quarter." Also, during the December 3, 1996 conference call, Mr. Rendall stated, "...we plan to establish continuous operation of three log washers, two of which will be installed in December of this year." Exs. 831, pp. 1, 2, 3; 30. This was materially false and misleading as the internal Solv-Ex objective as of December 1996, as communicated by Mr. Rendall to company personnel, was only to install one of the log washer trains and demonstrate that it could be operated to produce bitumen in some amount or separate some amount of bitumen from sand by the end of March 1997. Moreover, two weeks later in mid-December 1996, portions of only one log washer train were on site. Ex. 30; **Fox video testimony.**

4. Paragraph 44: (Page 16)

During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the log washer train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of fine particle solids, the filters were "blinded" and the log washer had to be shut down just after 12 hours of operation. Ex. 111, App. F; **Fox video testimony.** Messrs. Campbell and Rendall were both aware of the filtration problem had forced the shutdown. Recognizing this would make all prior bitumen production predictions completely impossible, Mr. Campbell

told Mr. Rendall the NASDAQ and others were expecting production by the end of March, so they better issue a statement. After numerous conversations over the weekend with Mr. Rendall, Mr. Campbell drafted a press release at 6:00 a.m. on March 31, 1997 and faxed it to NASDAQ. Solv-Ex announced that "bitumen production had commenced" at its Lease 5 oil plant. Ex. 34A. This was a material misstatement clearly designed to mislead investors.

5. Paragraph 48: (Page 17)

Following several unsuccessful attempts during early April 1997, Solv-Ex personnel first obtained a measurable amount of filtered Solv-Ex bitumen at the Lease 5 plant using the 24-inch prototype Mott filter on April 21, 1997. Exs. 108, 110, 111; **Fox video testimony.**

6. Paragraph 50: (Page 17)

The first successful filtration occurred on April 21, 1997, and the amount of filtered bitumen Solv-Ex produced through the use of the 24-inch prototype Mott filter was only two 55-gallon drums. Moreover, the production could not be duplicated. Ex. 110; **Fox video testimony.**

B. Rendall presented these findings as based on "evidence not in the record" to the trial court in his motion for retrial based on Federal Rules 60(b)(1)(2) (4)(6) and 28 U.S.C. § 144 dated August 17, 2004. Docket 155, Vol. V, as shown in page 9:

"D. The mistakes (evidence not in the record) in the 2003 Amended Findings of Fact and Conclusions of Law of Judge Bruce B. Black dated September 24, 2003.

1. Paragraph 23: The quotation of Alex Logwinuk is not in the video testimony presented at trial. (Exhibit D is a certified copy of the transcript).

2. Paragraphs 31, 34, 44, 48 and 50:

a) Jerry Fox's video testimony is non-existent. No such testimony exists."

C. **The Securities and Exchange Commission admitted that the AFC "evidence not in the record," as outlined by Rendall, as "trivial miscitations" in their opposition of Rendall's motion for retrial dated September 2, 2004. (Docket 156, page 1, Vol. V).**

D. **In oral argument dated October 29, 2004, the transcript, Vol. VI, the issues of evidence not in the record was the subject of oral argument with the trial judge (pages 15, 16, 17 and 18), which summarizes the facts relevant to this issue of "evidence not in the record" in this appeal.**

Mr. Rendall starts at page 10:

"... There is no basis on which the court of appeals could rightly look at the evidence except accepting Your Honor's version.

And now I'm presenting the evidence, Your Honor, which the court of appeals did not have, that this was not only a mistake, it was nonexistent evidence. No Court of law, Your Honor, can nonexistent evidence be used to justify findings of fact. It's outside the record.

And if you look at my affidavit, Your Honor,

which is attached to the motion, the primary evidence is these paragraphs of the nonexistent video testimony of Dr. Jerry Fox, 31, 34, 44, 48 and 50. Paragraph 23 was the nonexistent quote from Dr. Alex Logwinuk, and I've attached --

THE COURT: What do you mean by a nonexistent quote? I just made that up, or it wasn't sent to Denver with the record? What's your point exactly?

MR. RENDALL: I don't know where Your Honor got it from, but it wasn't in the transcript. Now, what was in the transcript -- the position of reading of the findings -- the original findings of fact, Your Honor, and the amended findings of fact is a concentration of issues which have no evidence in the record to back them up. The filtration of bitumen, he said, if you look at the transcript, could occur if the bitumen was heated. Instead, something was used to show it cannot be done. That's not in the evidence.

Paragraph 44, which is appendix -- which is Exhibit 111, Appendix F, is attached as Exhibit E, which goes to the crux of this issue. The plant was running on March the 29th, and the conclusion of this Court in the findings of fact was that it was more or less a dream. It wasn't a dream. It was a real plant. It was 60 foot high, Your Honor. And that's all in the transcript testimony. It produced oil. Not filtered bitumen. Filtered bitumen is not in the exhibit.

And what was said here in paragraph 44 is a component -- "due to buildup of fine particle solids, the filters were blinded." There is no such thing. No such thing in the document, no such thing in the

transcript. The only place where it can be justified is the video testimony of Dr. Jerry Fox, and it's nonexistent.

So based on the evidence not in the record, based on a crucial issue, which is the primary issue in this case, extraction of bitumen, Your Honor, I would submit that I have a factual basis. Not a frivolous basis, Your Honor. I'm not here frivolous. I'm here after a lot of consideration, and in good conscience, that Your Honor was biased and prejudiced.

To change -- if we changed places, Your Honor, you would have told me I was fabricating evidence. If I changed it and I did it, you would have called it fabrication.

It is a serious issue, Your Honor, to reach findings of fact which destroy -- well, this is not necessarily anything but rhetoric -- destroy a company and its CEO, based on evidence not in the record. And I have a reason in my affidavit to believe that Your Honor is biased and prejudiced. And I could not have filed this before now. It was in the court of appeals. And I believe the court of appeals did not have this evidence; it's newly discovered; it's a mistake. And I have filed an affidavit of your disqualifications, Your Honor, from any further opinion in this case.

THE COURT; That will be denied.

VII. SUMMARY OF THE ARGUMENT

Rendall has shown from clear and convincing facts in the record that he had a basis to believe that "bias and

prejudice" of the trial court existed in the use of "evidence not in the record" to substantiate its Amended Findings of Fact and Conclusions of Law dated September 24, 2005. Rendall has met the burden of proof required by 28 U.S.C. § 144 for disqualifications of the trial judge due to bias and prejudice.

VIII. THE ARGUMENT

A. Rendall has shown from the facts in the transcript of oral argument, Section VI, that the Amended Findings of Fact and Conclusions of Law dated September 24, 2004 contain numerous findings (6), which are not supported by any evidence in the record. It is even more persuasive insofar as the only support given is the non-existent video testimony of Dr. J. Fox in five of the findings. (Docket 152, Vol. V, pages 8, 9, paragraph 23; page 11, paragraph 31; pages 12, 13, paragraph 34; page 16, paragraph 44, page 17, paragraph 48, and page 17, paragraph 50.

Rendall has met the burden of proof that his belief in the bias and prejudice of the trial judge was factually demonstrated in a clearly erroneous basis in six of its findings. This standard is enunciated in Fed. R. Civ. P. Rule 52(a), "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, —." The six findings of fact, as stated in Section VI, is established as based on evidence not in the record, and in fairness and justice, the entire tainted Amended Findings of Fact must be set aside with a new trial and a new judge.

The Fifth Amendment of the U.S. Constitution guarantees Rendall a right to a "fair trial". It is a "stringent rule" and will bar trial when the appearance of justice is not satisfied as well as (in) instances of actual bias. In re Murchison, 349 U.S. 133, 136, 75 S. Ct 623, 625, 99 L. Ed 942 (1955).

In this instance, we have the actual bias of the trial judge in formulating Findings of Fact 31, 34, 44, 48, and 50 to support Conclusions of Law, when challenged to provide "basic evidence", as shown in deliberate use of non-existent video testimony of Dr. J. Fox in his (Judge Bruce B. Black's) Amended Findings of Fact and Conclusions of Law. The affidavit of Rendall, Docket 155, Vol. V (attached as Exhibit A) showing actual bias under 28 U.S.C. § 144 is timely and sufficient to show that "appearance of justice" is not satisfied in the ruling of the Appeals Court panel in accepting the trial judges assessment of the credibility of Rendall and his actual statements. This issue was dealt with in Re International Business Machines Corp. 618 F. 2d 923, 929 (1980) Second Circuit.

> "As Mr. Justice Frankfurter noted in Wilkerson v. Mc Carthy, 336 U.S. 53, 65, 69 S. Ct. 413, 419, 93 L.Ed. 407 (1949) (Frankfurter, J., concurring), "A timid judge, like a biased judge, is intrinsically a lawless judge."

Rendall is not clairvoyant and did not understand Judge Black's rulings as based on bias and prejudice until the Appeals Court ordered the trial judge to provide basic evidence, Docket 151, page 8. Bias and prejudice in the Amended Findings of Fact and Conclusions of Law, which were tainted by non-existent evidence in the video testimony of Dr. J. Fox, were raised by Rendall and now reasserted under the Fifth Amendment guarantee of a fair trial.

B. Standard if Review.

Judge Bruce B. Black has demonstrated bias and prejudice in his opinion as based on evidence not in the record (non-existent video testimony of Dr. J. Fox) and is disqualified

by 28 U.S.C. § 144 from this case.

1. The US Supreme Court rulings of bias and prejudice, as per 28 U.S.C. § 144 in United States v. Grinnell Corp, 384 U.S. 563, 583, 86 S.Ct 1698, 16 L.Ed. 2d 778 (1966) control this case.

> "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other that what the judge learned from his participation in the case. (Citation omitted.)"

The result of the judges disqualification is such that in fairness and in protection of Rendall's Constitutional rights to due process and equity, the order of the District Court enjoining Rendall from future violations of the Securities laws and imposing a $5000 penalty must be set aside.

2. The law of the case in Judge Bruce B. Black's sitting in judgment on an affidavit of his recusal is that it was without lawful right or power. Berger, et al. v. United States, 255 U.S. 22 (1921) *Id* at 36. This was a seminal case wherein the affidavit of bias and prejudice filed against a trial judge under Judicial Code, § 21, now 28 U.S.C. § 144, was examined in depth by the U.S. Supreme Court, Berger, *id* at 24:

> "A mere charge of bias and prejudice is a mere expression of an opinion. Bias or prejudice is a state of mind which can be proved only by facts and declarations from which it can be inferred. The act therefore requires that the facts and the reasons for the litigant's belief shall be stated. Whether the judge is disqualified depends, then, not upon the mere fact that prejudice has been charged, but upon

the facts which it is alleged tend to show such prejudice. Unless the facts so alleged were intended to be considered and decided, by some authority, to have a tendency to prove prejudice, the requirement that they should be stated was an idle ceremony. Congress having excluded every other judge from doing so, the judge against whom the charge is made must pass upon the sufficiency of the affidavit before he retires from the case.

The Affiant must state the facts of his own knowledge and not on information and belief. The statute requires that the *fact* shall be stated, so that action may not be based on mere belief."

Berger, *id* at 25.

"We are dealing now, however, with a case in which he is required to state facts, and not merely belief. It is not expected that any issue will be made or witnesses called to prove anything stated in the affidavit. The court is expected to act on the affidavit itself."

The trial court acted on Rendall's affidavit in oral argument. Tr. Page 18, Vo. VI:

"THE COURT: I say I denied the motion to disqualify for bias and prejudice. If anything, Mr. Rendalal, I was biased in favor of you and Mr. Campbell, and I tried to soft pedal my findings, and obviously, did too good a job of that, and that's why the court of appeals remanded it, so I could find exactly what was material in your misstatements, which I did in my amended findings. So I'll deny the bias and prejudice motion to recuse."

To return to the Berger case, id at 36 for a conclusion:

> "We come then to the question certified, and to the first we answer, yes, that is, that the affidavit of prejudice is sufficient to invoke the operation of the act. To the second we answer that, to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third we answer, no, that is, that Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment.
>
> *So ordered.*"

This is the crux of appellant Rendall's appeal showing that Judge Bruce B. Black had no lawful right or power to preside over Rendall's motion for retrial under Fed. R. Civ. P. 60 (b)(1)(2)(4)(6), and 28 U.S.C. § 144. This is exactly what the trial judge did as quoted above. The Securities and Exchange Commission appellees (plaintiff) have no standing to pronounce on the facts which form the basis of Rendall's belief. A judge is the trier of fact (not Judge Bruce B. Black) after the affidavit of Rendall was filed.

IX. CONCLUSION

For the good and sufficient facts and reasons stated above, appellant Rendall respectfully request that this court, in accordance with justice and equity, remand this case to the trial court in New Mexico for another judge to hear the proceedings with a fair trial to determine facts and conclusions of law.

Dated: February /s/ 21, 2005 Respectfully submitted,

/s/ John S. Rendall
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2121 Menaul Blvd. NE
Albuquerque, NM 87107
Phone (505) 883-2955
Fax (505) 883-0391

EXHIBIT A

Affidavit of John S. Rendall under 28 U.S.C. § 144 filed with his motion for retrial based on Federal Rules 60(b)(1)(2)(4)(6) and 28 U.S.C. § 144 dated August 19, 2004, Docket No. 155 after page 14 in Vol. V.

Note:

Paragraph 5 refers to Exhibit B, Docket 151, Vol. V

Paragraph 6 refers to Exhibit C, Docket 152, Vol. V

Paragraph 7 refers to Exhibit H, Docket 153, Vol. V

AFFIDAVIT OF JOHN S. RENDALL AS PER U.S.C. § 144 CLAIMING BIAS AND PREJUDICE OF THE HONORABLE BRUCE B. BLACK IN CIVIL ACTION 98-860 BB/RLP

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

John S. Rendall, first duly sworn upon oath, deposes and states:

1. I am a Defendant pro se in Docket Civil Action 98-860 BB/RLP.

2. The United States Court of Appeals 10th Circuit declined to hear Rendall's appeal for re-hearing on June 16, 2004. Exhibit A.

3. The "mistake" and "newly discovered evidence" on which John S. Rendall is claiming bias and prejudice of the Honorable Bruce B. Black in this action was sent by the said Judge to the Court of Appeals 10th Circuit (upon their remand) on September 24, 2003.

4. This is the first time Rendall is able to directly file this Affidavit claiming bias and prejudice of Judge Black. It could not have been filed at the hearings or on appeal until after June 16, 2004 when the case left the jurisdiction of the U.S. Court of Appeals 10th Circuit.

5. Attached as Exhibit B to this Affidavit is a true and correct copy of Court of Appeals Order dated August 4, 2003 in Case 00-2339,for Judge Black to provide specific primary evidence for his Findings of Fact and Conclusions of Law dated March 31, 2000 in CV 98-0860 BB/RLP.

6. Attached as Exhibit C to this Affidavit is a true and correct copy of Judge Black's Amended Findings of Fact and Conclusions of Law dated September 24, 2003, wherein the basis of the primary evidence in:

a) Paragraphs 31, 34, 44, 48, and 50 was the non-existent video testimony of Dr. J. Fox in CV 98-0860 BB/RLP.

b) Paragraph 23 was the non-existent quote from Dr. Alex Logwinuk's transcript of his video testimony, Exhibit D, claiming erroneously that he said unprocessed bitumen is very difficult to filter because of its viscosity, "like trying to filter cold molasses or tar." On the contrary, he did say in the transcript, page 32, 33, "The type of oils that we utilize in automobiles might have a viscosity of 50 or 60 centistokes. But you always have to specify a temperature with this, because you could take bitumen that has 200,000 centistokes at room temperature and heat it up to 3 or 400 degrees and it will have a viscosity down in the vicinity of 40, 50 or 60."

c) Pararaph 44 was the non-existent quote from Ex. 111, App. F, attached as Exhibit E. During the March 29, 1997 test, settling and build-up of solids occurred in the pump box, a component of the log washer train, in an amount significantly greater than anticipated. Ex. 111, App. F. Due to the build-up of fine particle solids, the filters were "blinded" and the log washer had to be shut down after just twelve hours of operation. Ex. 111, App. F; Fox video testimony.

7. Attached as Exhibit H to this Affidavit is a true and correct copy of the Order and Judgment of the Panel of the Appeals Court, Henry, Porfilio and Murphy, Circuit Judges, filed April 15, 2004, wherein no reference is made to the non-existent video testimony of Dr. J. Fox or of Rendall's claim

that the Findings of Fact and Conclusions of Law (Item 4), in its entirety, was tainted.

Further Affiant sayeth not.

/s/ John S. Rendall
John S. Rendall

Subscribed and sworn to before me this /s/ 13th day of August, 2004 by John S. Rendall.

/s/ Yvette Dow Lopez
Notary Public

My commission expires:
7-3-06
(notary seal affixed)

Supreme Court, U.S.
FILED
051482 APR 15 2006
OFFICE OF THE CLERK

(2)

No. _____

IN THE

Supreme Court of the United States

JOHN S. RENDALL, *Pro Se, Petitioner*

v.

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION (SEC), *Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Supplemental Index for Petition (April 20, 2006)

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SUPPLEMENTAL INDEX

ERRATA

PETITION FOR WRIT OF CERTIORARI

April 20, 2006

Page 98 date should read "January 26, 2006," instead of June 16, 2004. The entire Order and Judgment sought to be reviewed is now re-submitted (pages 98-101).

Page 7, line 4, "ambiguous" should read "unambiguous."

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EXHIBIT A 6

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs.

No. 05-2001
(D.C. No. CIV-98-860 BB/RLP)
(D.N.M.)

SOLV-EX CORPORATION; HERBERT M. CAMPBELL,

Defendants,

and

JOHN S. RENDALL,

Defendant-Appellant.

ORDER AND JUDGMENT
Filed January 26, 2006

Before **O'BRIEN, HOLLOWAY** and **BALDOCK,**
Circuit Judges

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered and submitted without oral argument.

Defendant John S. Rendall, proceeding *pro se*, appeals the district court's denial of his motion for disqualifications and for relief from judgment filed pursuant to 28 U.S.C. § 144 and Fed. R. Civ. P. 60(b)(1), (2), (4), and (6). Rendall contends that the district court judge relied on evidence that did not exist in making his amended findings of facts and conclusions of law in this SEC enforcement action. He further contends that the judge's reliance on evidence not in the record both established his bias and prejudice in tainted all his findings such that the judge should be disqualified and Rendall should be relieved from the judgment finding him guilty of securities violations, imposing civil penalties, and enjoining him from further violations. In particular, Rendall points to five instances in the judge's forty-five page decision in which he referred to a witness's video testimony when that witness actually testified in person at trial, one instance in which he purported to quote from a witness's testimony but did not do so accurately, and one instance in which he cited an exhibit that Rendall contends did not support the factual finding for which it was cited. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Section 144 provides for the disqualification of a district court judge when a party to a proceeding before that judge files a "timely and sufficient affidavit" showing that the judge has "a personal bias or prejudice either against him or in favor of any adverse party." An affidavit filed under § 144 is "strictly construed against the affiant and there is a substantial burden on the moving party to demonstrate that the judge is not impartial." *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992). "The bias charged must be of a personal nature and must be such as would likely result in a decision on some basis other than what the judge learned from his participation in the case." *United States v. Irwin*, 561 F.2d 198, 200 (10th Cir. 1977). Further, "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Human v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987).

Whether to recuse is a decision "committed to the sound discretion of the district court," and we will not reverse a judge's refusal to recuse absent an abuse of that discretion. *Burger*, 964 F.2d at 1070. Based upon our careful review, we conclude that the district court judge properly denied Rendall's motion seeking to disqualify him under § 144. Even if the district court judge did make the errors Rendall cites, they do not suggest in any way that bias or prejudice was at work in the judge's decision.

Because the district court judge properly refused to disqualify himself from the case, it was proper for him to rule on Rendall's motion for relief from judgment under Rule 60(b). To the extent that Rendall challenges the district court's denial of his Rule 60(b) motion on the merits, we generally review that decision for an abuse of discretion. *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir.

2000).

"Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances." *Bud Brooks Trucking, Inc.v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990). Our review demonstrates that none of the errors cited by Rendall justifies relief from the judgment under Rule 60(b)(1), (2), (4), or (6). Therefore, the district court properly denied Rendall's motion.

The judgment of the district court is AFFIRMED. Appellee's motion for summary dismissal of the appeal is DENIED as moot.

Entered for the Court

Bobby R. Baldock
Circuit Judge